(1)

Supreme Court, U.S.
FILED

95-263 AUG 15 1995

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

CHESHIRE MEDICAL CENTER,

Petitioner,

v.

W.R. GRACE & CO. AND W.R. GRACE & CO.-CONN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL P. HALL
NIXON, HALL AND HESS
Eighty Merrimack Street
Manchester, NH 03101
(603) 669-8080

DANIEL A. SPEIGHTS
SPEIGHTS & RUNYAN
304 Lee Avenue
Post Office Box 685
Hampton, SC 29924
(803) 943-4444

Attorneys for the Petitioner Cheshire Medical Center

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

100 pp

QUESTIONS PRESENTED FOR REVIEW

1. In determining whether or not an objection to an instruction is sufficiently specific under Rule 51 of the Federal Rules of Civil Procedure, may a federal Court of Appeals totally disregard the District Court's decision that the objection "properly preserved" the issue or is this decision entitled to at least some deference?

2. May the federal Courts of Appeal apply a "plain error" exception to Rule 51 of the Federal Rules of Civil Procedure and, if so, does a Court of Appeals have the discretion to refuse to review for plain error an instructional error the District Court admittedly made and concluded was properly preserved after the appellate court reviews for plain error another instruction both it and the District Court agreed was not properly preserved?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceeding are the petitioner, Cheshire Medical Center, and the respondents W.R. Grace & Company and W.R. Grace & Company-Conn.

The Cheshire Medical Center ("Cheshire"), a non-profit hospital incorporated in the State of New Hampshire, has no parent organization. Its partially owned subsidiaries are: the Connecticut Medical Insurance Company Risk Retention Group, New Hampshire Imaging Services, New Hampshire Lithotripsy, and Monadnock Sports Medicine. Cheshire also has entered into non-profit joint ventures with the Behavioral Health Network and the Unified Health Alliance, and is a member of the for-profit VHA-NE cooperative.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

FEDERAL RULE INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. The Repeatedly Declared Purpose of Requiring Specific Instructional Objections Shows That Deference Is Owed To A District Court's Decision That An Objection "Properly Preserved" The Claimed Error 8

II. In A Criminal Case, This Court Deferred To A District Court's Conclusion That Instructional Objections Properly Preserved The Error 10

III. Certiorari Is Necessary To Resolve The Circuit Split On Whether Plain Error Review Of Instructions Is Available In Civil Cases 11

IV. Certiorari Is Necessary To Determine What, If Any, Limits Exist On The Courts Of Appeals Discretion To Review For Plain Error In Civil Appeals 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 821 (1984) 13

Beaver v. Taylor, 93 U.S. 46 (1876) 8

Bertrand v. Southern Pacific Co., 282 F.2d 569 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961) 12

Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652 (1st Cir. 1981) 16

Chellman v. Saab-Scania AB, 138 N.H. 73, 637 A.2d 148 (1993) 5, 6, 16

Cheshire Medical Center v. W.R. Grace & Co., 853 F. Supp. 564 (D.N.H. 1994) ..... *passim*

Cheshire Medical Center v. W.R. Grace & Co., 49 F.3d 26 (1st Cir. 1995) ..... *passim*

City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981) 12, 15

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 9

Deppe v. Tripp, 863 F.2d 1356 (7th Cir. 1988) 12

Hammer v. Gross, 932 F.2d 842 (9th Cir. en banc), *cert. denied*, 502 U.S. 980 (1991) 12

Hebron v. Touchy, 18 F.3d 421 (7th Cir. 1994) 12

Hicks v. United States, 150 U.S. 442 (1893) 10, 11

Highlands Ins. v. National Union Fire Ins., 27 F.3d 1027 (5th Cir. 1995), *cert denied*, 513 U.S. ___, 115 S.Ct. 903, 130 L.Ed.2d 786 (1995) 15

TABLE OF AUTHORITIES – Continued

Page(s)

Hobson v. Wilson, 737 F.2d 1 (1984), *cert. denied*, 470 U.S. 1984 (1985) 13

Jordan v. United States Lines, Inc., 738 F.2d 48 (1st Cir. 1984) 12

Lear v. Equitable Life Assurance Society of the United States, 798 F.2d 1128 (8th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) 2

Lusby v. T.G. & Y Stores, Inc., 796 F.2d 1307 (10th Cir.), *cert. denied*, 479 U.S. 884 (1986)..... 13

Memphis Community School District v. Stachura, 477 U.S. 299 (1986) 9

Morris v. Getscher, 708 F.2d 1306 (8th Cir. 1983) 13

O'Brien v. Willys Motors, Inc., 385 F.2d 163 (6th Cir. 1967).....13, 15

O'Neal v. McAninch, 513 U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)..... 16

Palmer v. Hoffman, 318 U.S. 109 (1943)..... 8

Pate v. Seaboard Railroad, Inc., 819 F.2d 1074 (11th Cir. 1987) 13

Pennsylvania Railroad Company v. Minds, 250 U.S. 368 (1919)..... 9

Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965), *cert. denied*, 382 U.S. 987 (1966).....13, 15

Rodrigue v. Dixilyn Corp., 620 F.2d 537 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).... 13, 15, 16

Rush v. Smith, 56 F.3d 918 (8th Cir. en banc. 1995) 15

Sharp v. Root, 240 F.2d 519 (5th Cir. 1957)..... 3

TABLE OF AUTHORITIES – Continued

Page(s)

Shokuwan Shimabukuro v. Higeyoshi Nagayama, 140 F.2d 13 (D.C. 1944), *cert. denied*, 322 U.S. 755 (1944) 13

Smith v. Gulf Oil Co., 995 F.2d 638 (6th Cir. 1993) 15

Stewart v. Hall, 770 F.2d 1267 (4th Cir. 1985) 13

Sunkist Growers v. Winckler & Smith Co., 370 U.S. 19 (1962) 9

Swiderski v. Moodenbaugh, 143 F.2d 212 (9th Cir. 1944) 3

Transnational Corp. v. Rodio & Ursillo, Ltd., 920 F.2d 1066 (1st Cir. 1990) 2

Und Commerz Union Austalt v. Collector's Guild, 930 F.2d 1021 (2d Cir. 1991) 13

United States v. Olano, 507 U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 14, 15, 17

Wilton v. Seven Falls Co., 515 U.S.___, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) 10

Winstead v. Hildenbrand, 159 F.2d 25 (D.C. Cir. 1947) (per curiam) 3

STATUTES:

28 U.S.C. §1254(1) 1

28 U.S.C. §2101(c) 1

RULES:

Federal Rules of Civil Procedure Rule 51 ..... 1, 5, 6, 9, 10, 12, 13

Federal Rules of Criminal Procedure Rule 52(b) .. 12, 14

TABLE OF AUTHORITIES – Continued

Page(s)

Supreme Court Rule 10.1(a) 14

Supreme Court Rule 10.1(c) 10, 11, 17

Supreme Court Rule 13.4 1

OTHER AUTHORITIES:

Restatement (Second) of Torts, §402A 6

Wright & Miller Federal Practice & Procedure, Civil 2d §2554 (1994) 10

OPINIONS BELOW

Cheshire seeks review of *Cheshire Medical Center v. W.R. Grace & Co.*, 49 F.3d 26 (1st Cir. 1995), *aff'g* 853 F.Supp. 564 (D.N.H. 1994). The district court decision is reprinted in the Appendix ("A") at A25-50; the appellate decision at A1-24; and the denial of Cheshire's petition for panel rehearing and request for rehearing en banc at A51-52.

STATEMENT OF JURISDICTION

The First Circuit opinion Cheshire asks this Court to review was entered on March 6, 1995. A1. Cheshire timely filed a petition for rehearing and request for rehearing en banc on March 20, 1995. A71. It was denied on May 17, 1995. A51.

Jurisdiction is proper under 28 U.S.C. §1254(1), 28 U.S.C. §2101(c), and Supreme Court Rule 13.4 in that this petition for a writ of certiorari was filed within ninety days from the date the Court of Appeals denied Cheshire's petition for rehearing.

FEDERAL RULE INVOLVED IN THE CASE

Rule 51 of the Federal Rules of Civil Procedure provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the requests. The court shall then

inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after the argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Cheshire at trial sought to recover from W.R. Grace & Company and W.R. Grace & Co.-Conn. ("Grace") the cost of abating and removing Monokote, an asbestos-containing fireproofing Grace manufactured, from its hospital building. A3 (49 F.3d at 28). Cheshire's liability theories included the claim that Grace was negligent for failing to provide Cheshire adequate warnings about the fireproofing, and the separate claim that inadequate product warnings also rendered Grace strictly liable under New Hampshire product liability law. A29 (853 F.Supp. at 567).

While Cheshire did not propose a written request to charge that inadequate warnings could render Grace strictly liable, A34-35 n. 3 (853 F.Supp. at 569),[1] Grace

[1] In the First Circuit, oral objections to the charge must be made after the jury is charged but before it begins deliberations. Prior written requests to charge are insufficient. *Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1069 (1st Cir. 1990). All the federal appellate courts apparently agree that Rule 51 does not require that requests to charge be written. *See Lear v.*

made a written charge request on this particular strict liability claim:

> . . . In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning as to the possible dangers but only if it knew or should have known of these dangers at the time of the sale. . . . As with the plaintiff's negligence claim, W.R. Grace & Co. cannot be liable to Cheshire Medical Center if, at the time of the sale, it neither knew or should have known about possible dangers in its product.
>
> A74.

The only warning charge given, however, was a negligence instruction which charged that, if Grace knew or should have known that the fireproofing it sold to Cheshire was dangerous or would damage property, Grace had a duty to inform Cheshire "in the exercise of reasonable care." A29 (853 F.Supp. at 567).

While the separate strict liability instructions further charged that Grace could be strictly liable if the fireproofing was in an "unreasonably dangerous condition," A30-31 (853 F.Supp. at 567), the District Court did not give Grace's written request to charge on strict liability for inadequate warnings or otherwise explain to the jury

---

Equitable Life Assurance Society of the United States, 798 F.2d 1128, 1133 (8th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987); *Sharp v. Root*, 240 F.2d 519, 522-23 (5th Cir. 1957); *Winstead v. Hildenbrand*, 159 F.2d 25, 27 (D.C.Cir. 1947) (per curiam); *Swiderski v. Moodenbaugh*, 143 F.2d 212, 213 (9th Cir. 1944).

that an inadequate product warning is itself an "unreasonably dangerous condition" which can render Grace strictly liable. A26-27 (853 F.Supp. at 566).

The District Court gave the parties the opportunity to object to the instructions after the jury was fully charged but before it began its deliberations. A72. The Court stopped Cheshire's attempt to incorporate any of its previous written requests to charge, admonishing Cheshire that "if it had an objection to the charge, I think you better make it right here." A72. Cheshire did exactly what the Court directed and, as its first objection, Cheshire raised the failure to charge that inadequate warnings can render Grace strictly liable:

> MR. SPEIGHTS (Cheshire's Counsel): Your, Honor, we do not believe the Court charged that a – failure to warn can also make a product unreasonably dangerous, that it can be a defective and dangerous product under strict liability as well as a count in the negligence cause of action. A product may be unreasonably dangerous if it does not have an adequate warning.
>
> A72.

After the Court overruled this objection, the jury returned a special verdict which found for Grace on Cheshire's negligence and strict liability claims. A3-4 (49 F.3d at 28-29).

Cheshire's motion for a new trial raised the omitted strict liability charge. A26 (853 F.Supp. at 566). The District Court's decision on the motion never suggested that the District Court had misunderstood Cheshire's request to charge on strict liability for inadequate warnings, that it lacked an opportunity to correct this error before the jury deliberations, or that Cheshire's

objection was otherwise insufficient under Fed.R.Civ.P. 51. A26-36 (853 F.Supp. at 566-69).[2] To the contrary, the District Court explicitly held that its failure to charge on strict liability for inadequate warnings was indeed legal error, that Cheshire "properly preserved this issue by timely objection," and that Cheshire is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights:"

> Because the instruction given did not specifically inform the jury that the manufacturer's failure to warn could be relevant to the existence of an unreasonably dangerous design defect, *Chellman* [*Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993)] compels the conclusion that the court's omission of a strict liability failure-to-warn instruction was indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability claim, if the error affected its substantial rights.
>
> A31-32 (853 F.Supp. at 568).

The only reason the District Court denied Cheshire a new trial on its strict liability claim was the District Court's belief that the error it admittedly made was harmless because "the jury's verdict on the negligence count necessarily precluded a finding in plaintiff's favor with respect to the strict liability duty to warn." A35-36 (853 F.Supp. at 569).

---

[2] Grace's response to Cheshire's motion for a new trial also failed to suggest that this issue was not adequately preserved.

In contrast to the District Court's ruling that Cheshire "properly preserved" the omitted strict liability instruction, the District Court's post-trial decision further noted that Cheshire did not object to the Court's separate failure to charge on New Hampshire's asbestos exposure levels. A39 (853 F.Supp. at 571).

Cheshire raised both omitted charges on appeal. As to Grace's strict liability, Cheshire argued that the error the District Court admittedly made was not harmless because the omitted charge would have explained that Grace can be strictly liable for inadequate product warnings despite its reasonable care to warn. A2, 21 (49 F.3d at 29, 35).[3] The First Circuit assumed that the District Court correctly held this failure to charge was error, A5 (49 F.3d at 29), but avoided deciding whether the error was harmless. The Court instead held that Cheshire's objection was not specific enough to satisfy Fed.R.Civ.P. 51. A21-22 (49 F.3d at 35). In reaching this conclusion, the First Circuit did not even mention the District Court's contrary holding that Cheshire had "properly preserved the issue by timely objection" and is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights." A31-32 (853 F.Supp. at 568).

---

[3] In *Chellman*, the New Hampshire Supreme Court reaffirmed that strict liability under the Restatement (Second) of Torts, §402A, applies to inadequate warning claims and that a manufacturer may be strictly liable "despite the care exercised to design a safe product." *Chellman*, 138 N.H. at 77, 637 A.2d at 150.

The First Circuit also failed to perform a plain error review of the strict liability charge the District Court held was erroneous.

The First Circuit did, however, perform a plain error review on Cheshire's separate challenge to the failure to charge the New Hampshire asbestos exposure levels. A9-10 (49 F.3d at 30-31). Unlike the objection to the admittedly erroneous charge, both the First Circuit and the District Court noted that Cheshire failed to object to the instructions on the asbestos exposure level. A9 (49 F.3d at 30); A39 (853 F.Supp. at 571).

Cheshire's timely filed petition for rehearing and request for rehearing en banc argued: (1) the Court did not pay the required deference to the District Court's conclusion that Cheshire "properly preserved" the omitted strict liability instruction and is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights," A31-32 (853 F.Supp. at 568); and (2) the Court, after reviewing the other instruction for plain error, should have also reviewed for plain error the strict liability instruction the District Court admitted was erroneous and held was properly preserved. A54-57, 62-64, 68-70.

Cheshire's petition for rehearing and request for rehearing en banc was denied on May 17, 1995. A51-52.

REASONS FOR GRANTING THE WRIT

Since at least 1876, this Court has consistently held that the purpose served by specific instructional objections is to give the trial court an opportunity to correct the error before the jury deliberations. District courts are of course in the best, if not the only, position to decide whether or not an objection gave them this opportunity. A district court's conclusion that a timely objection did indeed properly preserve an error is thus entitled to at least some deference on appeal. This Court has shown such deference. The First Circuit did not.

Certiorari is also necessary to resolve the split among the Courts of Appeals on whether or not they can review instructions for plain error in civil cases and, if so, what if any limits exist on their discretion to do so. In this case, the First Circuit reviewed another instruction for plain error without reviewing for plain error the charge the district court held was erroneous and concluded was properly preserved.

I. THE REPEATEDLY DECLARED PURPOSE OF REQUIRING SPECIFIC INSTRUCTIONAL OBJECTIONS SHOWS THAT DEFERENCE IS OWED TO A DISTRICT COURT'S DECISION THAT AN OBJECTION "PROPERLY PRESERVED" THE CLAIMED ERROR.

Decisions dating from at least *Beaver v. Taylor*, 93 U.S. 46 (1876) to *Palmer v. Hoffman*, 318 U.S. 109 (1943), repeatedly hold that the purpose served by requiring specific instructional objections is to give the trial court "an opportunity to correct errors and omissions himself

before the same are made the basis of error proceedings." *Pennsylvania Railroad Company v. Minds*, 250 U.S. 368, 375 (1919) (citations omitted).

More recently, *Sunkist Growers v. Winckler & Smith Co.*, 370 U.S. 19, 26-27 (1962) held that the petitioner's acquiescence at trial to the instructions it objected to on appeal did not forfeit its objection because the record showed that the district court understood the objection and assured counsel that its objection was preserved. In *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 n. 6 (1986), this Court similarly rejected a challenge brought under Fed.R.Civ.P. 51 because the exchange of case citations was sufficient to show that the District Court understood the objection to the instructions.

In this case, the District Court explicitly held that Cheshire's objection to the failure to charge strict liability for inadequate product warnings "properly preserved" the issue. A32 (853 F.Supp. at 568). Because the First Circuit did not mention this district court decision, even after Cheshire emphasized it in Cheshire's petition for rehearing (A54-56, 63-64), the appellate court's contrary conclusion was necessarily based on a de novo review.

De novo review is inappropriate. District courts are obviously in the best, if not only, position to decide for themselves whether or not an objection is specific enough to give them an opportunity to correct their instructional errors. Just as "the district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990), the district court is far better situated than the

court of appeals to apply the fact-dependent specificity standard mandated by Fed.R.Civ.P. 51. In other words, the "respective institutional advantages of trial and appellate courts," *Wilton v. Seven Falls Co.*, 515 U.S. ___, 115 S.Ct. 2137, 2143, 132 L.Ed.2d 214, 225 (1995) (citations omitted), compels deference to the district court's conclusion that an instructional objection was specific enough to preserve the issue.

While literally scores of appellate decisions have addressed whether or not an instructional objection is sufficiently specific to meet the requirements of Fed.R.Civ.P. 51, *see* 9A Wright & Miller, *Federal Practice & Procedure*, Civil 2d §2554 at 419-31 (1994) (collecting cases), this Court has apparently never determined what level of review Courts of Appeals should apply to district court decisions on whether or not an objection was properly preserved in civil cases. This is "an important question of federal law which has not been, but should be, settled by this Court. . . . " Sup.Ct. Rule 10.1(c).

II. IN A CRIMINAL CASE, THIS COURT DEFERRED TO A DISTRICT COURT'S CONCLUSION THAT INSTRUCTIONAL OBJECTIONS PROPERLY PRESERVED THE ERROR.

While this Court has apparently never addressed the issue in a civil case, in an early criminal case this Court deferred to a trial court's ruling that the objections to the instructions properly preserved the issues for appeal.

In *Hicks v. United States*, 150 U.S. 442 (1893), this Court held that the exceptions to the charge were sufficiently specific to raise the questions considered because

"the learned judge below seems to have been satisfied with the shape in which the exceptions were presented to him . . . ." *Id.* at 453. The two member dissent took this deference to task:

> The suggestion that because the learned judge below was satisfied with the shape in which the exceptions were presented to him, this court must consider them as sufficient for any matter which the ingenuity of counsel may, since the trial, have discovered, has certainly the merit of novelty.

Id. at 457 (Brewer, J., joined by Brown, J., dissenting).

Because the standard of review of a trial court's decision on the adequacy of an instructional objection should be the same for both civil and criminal cases, the First Circuit's lack of deference in the present case places this case within that narrow class of cases where a Court of Appeals "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct. Rule 10.1(c).

III. CERTIORARI IS NECESSARY TO RESOLVE THE CIRCUIT SPLIT ON WHETHER PLAIN ERROR REVIEW OF INSTRUCTIONS IS AVAILABLE IN CIVIL CASES.

After silently overruling the District Court's decision that the omitted strict liability charge was "properly preserved by timely objection," A32 (853 F.Supp. at 568), the First Circuit inexplicably failed to review the admittedly erroneous charge for plain error after it reviewed another instruction for plain error. A9 (49 F.3d at 30-31).

City of Newport v. Facts Concerts, Inc., 453 U.S. 247, 257 n. 16 (1981) found it unnecessary to review the Courts of Appeals' application of a "plain error exception" to Fed.R.Civ.P. 51. At the time, only Ninth Circuit panel decisions held that there is no such exception. *See, e.g., Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied* 365 U.S. 816 (1961).

The split among the Courts of Appeals has widened since *City of Newport* was rendered. An en banc Ninth Circuit decision has reaffirmed that the courts in its circuit can not review instructions in civil cases for plain error. *Hammer v. Gross*, 932 F.2d 842, 846-848 (9th Cir. en banc), *cert. denied* 502 U.S. 980 (1991). The Seventh Circuit now agrees. *See, e.g., Hebron v. Touchy*, 18 F.3d 421, 424 (7th Cir. 1994); *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988). These courts reason that Fed.R.Civ.P. 51 precludes any plain error review because the rule lacks a provision comparable to the plain error provision in Fed.R.Crim.P. 52(b). *See Hammer*, 932 F.2d at 848; *Deppe*, 863 F.2d at 1360-61. In *City of Newport*, Justice Brennan's dissent, joined by Justices Marshall and Stevens, noted this distinction. *City of Newport*, 453 U.S. at 276 n. 7 (dissenting opinion).

The *City of Newport* dissent, however, further recognized that other Courts of Appeals have in civil cases reviewed unpreserved instructional objections for plain error because, "like other procedural rules, Rule 51 is susceptible to flexible interpretation when strictly necessary to avoid a clear miscarriage of justice." *City of Newport*, 453 U.S. at 274-75 (dissenting opinion; citations omitted). In a decision authored by then Circuit Judge Breyer, for example, the First Circuit noted in *Jordan v.*

United States Lines, Inc., 738 F.2d 48, 51 (1st Cir. 1984), that the Court saw "no 'plain error' " after it held that the instructional objection was not specific enough to satisfy Fed.R.Civ.P. Rule 51. The Tenth Circuit also reviews instructions for plain error, but, like the First Circuit, has apparently never reversed a judgment based on a plainly erroneous instruction. *See, e.g., Lusby v. T.G. & Y Stores, Inc.*, 796 F.2d 1307, 1311-12 (10th Cir.), *cert. denied*, 479 U.S. 884 (1986).

The remaining nine circuits have all reversed judgments based on unpreserved, but plainly erroneous, instructions. *See, e.g., Und Commerz Union Austalt v. Collector's Guild*, 930 F.2d 1021, 1027 (2d Cir. 1991); *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 486 (3d Cir. 1965), *cert. denied* 382 U.S. 987 (1966); *Stewart v. Hall*, 770 F.2d 1267, 1267 (4th Cir. 1985); *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 540-41, 544 (5th Cir. 1980), *cert. denied* 449 U.S. 1113 (1981); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 166-167 (6th Cir. 1967); *Morris v. Getscher*, 708 F.2d 1306, 1309-1311 (8th Cir. 1983); *Pate v. Seaboard Railroad, Inc.*, 819 F.2d 1074, 1082-1083 (11th Cir. 1987); *Shokuwan Shimabukuro v. Higeyoshi Nagayama*, 140 F.2d 13 (D.C. 1944), *cert. denied* 322 U.S. 755 (1944);[4] *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1364 (Fed.Cir. 1984), *cert. denied* 469 U.S. 821 (1984).

---

[4] Then Circuit Judge Scalia was a panel member in a later decision from the District of Columbia Court of Appeals which questioned whether or not plain error review applies in civil cases. *Hobson v. Wilson*, 737 F.2d 1, 32 n. 96 (1984), *cert. denied* 470 U.S. 1984 (1985) (noting split of authority).

These reversals would have necessarily been affirmed had the appellants litigated in one of the twelve states which comprise the Seventh and Ninth circuits. Certiorari is necessary to resolve this circuit split. Sup.Ct Rule 10.1(a).

IV. CERTIORARI IS NECESSARY TO DETERMINE WHAT, IN ANY, LIMITS EXIST ON THE COURTS OF APPEALS DISCRETION TO REVIEW FOR PLAIN ERROR IN CIVIL APPEALS.

The First Circuit reviewed the omitted asbestos exposure level charge for plain error, A9-10 (49 F.3d at 30-31), but inexplicably failed to review for plain error the strict liability charge the District Court admitted was erroneous. A31-32 (853 F.Supp. at 568).

United States v. Olano, 507 U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) recently addressed the discretion Courts of Appeals have to correct plain error under Fed.R.Crim.P. Rule 52(b). After noting that the text of Fed.R.Crim.P. Rule 52(b) indicates that an appellate court's ability to correct plain error is "permissive, not mandatory," this Court nevertheless limited that discretion by holding that a Court of Appeals should correct plain errors "in those circumstances in which a miscarriage of justice would otherwise result" or where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at ___, 113 S.Ct. at 1778-79, 123 L.Ed.2d at 520-21.

Citing *Olano*, several Courts of Appeal have applied the same standard in civil appeals, holding that " 'the

principles and decision enunciated in *Olano* apply *a fortiori* in the civil context where courts pay less strict attention to procedural protocol.' " *Highlands Ins. v. National Union Fire Ins.* 27 F.3d 1027, 1032 (5th Cir. 1995), *cert. denied*, 513 U.S. ___, 115 S.Ct. 903, 130 L.Ed.2d 786 (1995), *citing Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir. 1993). *See also Rush v. Smith*, 56 F.3d 918, 925-26 (8th Cir. en banc 1995) (dissent advocated applying *Olano*). On the other hand, Mr. Justice Brennan's dissent in *City of Newport* noted that the rules' text "suggests that review of unchallenged jury instructions is intended to be more restrictive under the Civil than under the Criminal Rules." *City of Newport*, 453 U.S. at 276 n. 7.

Applying the standard later established in *Olano*, early diversity-based product liability decisions have reversed jury verdicts where unchallenged instructions charged non-existent defenses or improperly shifted the burden of proof. In *Pritchard*, for example, the Third Circuit applied a "miscarriage of justice" standard when it reversed a jury verdict for the manufacturer because a plainly erroneous instruction charged a non-existent assumption of the risk defense to an express warranty claim. *Pritchard*, 350 F.2d at 486. The Sixth Circuit's *O'Brien* decision similarly held that the erroneous charge "seriously affected the fairness, integrity or public reputation" of the proceeding when it reversed a jury verdict for a manufacturer based on the unchallenged failure to charge that the manufacturer had the burden of proving contributory negligence. *O'Brien*, 385 F.2d at 166-67. The Fifth Circuit's *Rodrigue* decision similarly found "substantial injustice" when it reversed a jury verdict for a manufacturer based on an unchallenged instruction which

charged a non-existent "contributory negligence" defense to the plaintiff's strict product liability claim. *Rodrigue*, 620 F.2d at 540-41.

In this case, the District Court explicitly held that *Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993) compelled its holding that the failure to charge strict liability for inadequate warnings was an error which entitled Cheshire "to a new trial, on the strict liability claim, if the error affected its substantial rights." A31-32 (853 F.Supp. at 568).

After Cheshire pointed out on appeal that the admitted error did indeed affect its substantial rights because a properly instructed jury could have found Grace strictly liable for inadequate warnings despite its reasonable care,[5] the First Circuit assumed that the District Court correctly held that the omission was error, A5 (49 F.3d at 29), but refused to decide if there was "grave doubt as to the harmlessness of [the admitted] error," *O'Neal v. McAninch*, 513 U.S. ___, ___, 115 S.Ct. 992, 994, 130 L.Ed.2d 947, 951 (1995), or if the admittedly flawed instruction seriously affected the proceeding's fairness.

---

[5] An inadequate warning can render the seller strictly liable "despite the care exercised to design a safe product." *Chellman*, 138 N.H. 73, 77, 637 A.2d 148, 150 (1993). Then Circuit Judge Breyer reached the same conclusion in *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir. 1981). The Court, applying New Hampshire law, held that a "product sold without adequate warnings is in a defective condition" and approved a jury charge that this defect can render the seller strictly liable even though it "exercised all possible care in the preparation and sale of the product . . . ." *Id.* at 660-661.

In sharp contrast, the First Circuit reviewed another instruction for plain error, concluding that the error, if any, was harmless. A9-10 (49 F.3d at 26).

Certiorari is necessary to determine whether or not the Courts of Appeals can arbitrarily pick which instructions it will review for plain error and whether the limits *Olano* placed on the Court of Appeals' discretion to refuse plain error review applies in civil appeals. *Olano*, 507 U.S. at ___, 113 S.Ct. at 1778-79, 123 L.Ed.2d at 520-21. This too is "an important question of federal law which has not been, but should be, settled by this Court. . . . " Sup.Ct. Rule 10.1(c).

CONCLUSION

Certiorari should be granted and the case remanded for the First Circuit to apply a deferential standard of review to the District Court's explicit conclusion that the admittedly erroneous strict liability charge was "properly preserved by timely objection," and that Cheshire is accordingly "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights," or for the First Circuit to at least review for plain error the instructional error the District Court admittedly made.

MICHAEL P. HALL
NIXON, HALL AND HESS
Eighty Merrimack Street
Manchester, NH 03101
(603) 669-8080

DANIEL A. SPEIGHTS
SPEIGHTS & RUNYAN
304 Lee Avenue
Post Office Box 685
Hampton, SC 29924
(803) 943-4444

Attorneys for the Petitioner
Cheshire Medical Center

CHESHIRE MEDICAL CENTER,
Plaintiff-Appellant,

v.

W.R. GRACE & CO., Defendant-Appellee.

No. 94-1687.

United States Court of Appeals,
First Circuit.

Heard Dec. 7, 1994.

Decided March 6, 1995.

Building owner brought products liability action against manufacturer of asbestos-containing product under New Hampshire theories of negligence and strict liability. The United States District Court for the District of New Hampshire, Steven J. McAuliffe, J., 853 F.Supp. 564, entered judgment on jury verdict for manufacturer and denied owner's motion for new trial. Owner appealed. The Court of Appeals, Keeton, District Judge, sitting by designation, held that: (1) manufacturer did not have duty to warn based on speculation that product might be dangerous; (2) district court did not commit plain error in failing to instruct jury on state standard for asbestos exposure; (3) manufacturing defect, design defect, and warning defect were three separate theories of strict liability, not merely factors that could support single finding of strict liability; (4) jury's finding on negligence-based duty-to-warn claim barred strict liability duty-to-warn claim; (5) jury did not have unlimited authority under New Hampshire law to weigh all policy arguments to reach single finding on strict liability claim; and (6) owner failed to preserve for appellate review issue of whether New Hampshire imposed more onerous

duty than one of prudent care as part of law of strict products liability.

Affirmed.

Daniel A. Speights, Hampton, SC, with whom Michael P. Hall, Nixon, Hall and Hess, Manchester, NH and Speights & Runyan, Hampton, SC, were on brief, for appellant.

Richard V. Wiebusch, with whom Harry T. Daniels, Jane Cetlin Pickrell, Hale and Dorr, Manchester, NH, Howard M. Cooper and Todd & Weld, Boston, MA, were on brief, for appellee.

Before SELYA and CYR, Circuit Judges, and KEETON,* District Judge.

KEETON, District Judge.

Appealing from a judgment for the defendant on a jury verdict, plaintiff-appellant argues an interesting undecided issue of New Hampshire law regarding the scope of strict liability on the ground of product defect in relation to warning and instructions for use. May a product marketer be held strictly liable on the basis of failure to warn, for harm to a building into which its product (containing asbestos fibers) was installed, even though the jury has found, in answering special questions, that plaintiff failed to prove any departure from ordinary prudence with respect to warning and instructions for use?

---

* Of the District of Massachusetts, sitting by designation.

We conclude that the jury findings, together with settled rules of federal procedural law and New Hampshire substantive law, preclude our reaching this interesting question. For the reasons explained, we affirm the judgment for the defendant on the verdict of the jury.

I.

Plaintiff-appellant alleged that defendant's product, Monokote 3, a fireproofing material, purchased in 1971 by a subcontractor in compliance with specifications, and used in constructing a building occupied and used at all relevant times by plaintiff (an entity designated in the general contract for construction of the building as "owner") was defective because of a percentage of asbestos particles in the product. In the various counts of the complaint, plaintiff alleged claims of negligence (in manufacture, sale, and warning), strict liability for product defect, and breach of implied warranty.

The case was submitted to a jury on special questions, Fed.R.Civ.P. 49(a). The jury returned the following answers:

SPECIAL VERDICT FORM

1. On the statute of limitations defense, do you find for the Plaintiff or the Defendant?

x Plaintiff _ Defendant

If you find for the Defendant on this issue, stop and return a verdict in favor of the Defendant.

If you find for the Plaintiff on this issue, answer questions 2, 3, 4, 5 and/or 6.

2. On Plaintiff's negligence claim, do you find for the Plaintiff or the Defendant?

_ Plaintiff x Defendant

3. On Plaintiff's products liability claim, do you find for the Plaintiff or the Defendant?

_ Plaintiff x Defendant

4. On Plaintiff's implied warranty claim, do you find for the Plaintiff or the Defendant?

_ Plaintiff x Defendant

5. If you found for the Plaintiff on one or more of its claims (questions 2, 3, or 4) please write the amount of damages you award to Plaintiff using words and figures (as in writing a check).

Damages awarded: -none-

($)

6. If you found for the Defendant on each of Plaintiff's claims (questions 2, 3, and 4), then return a verdict in favor of Defendant.

DATE: 11/3/93

/s/
Foreperson

The court's charge to the jury included instructions advising the jury they should answer that the plaintiff had proved negligence if they found by a preponderance of the evidence that defendant failed to exercise ordinary prudence in manufacture, or in sale, or in relation to warning (including instructions for use). Thus, unless plaintiff-appellant shows some trial error that undermines this finding (and we conclude in Part III, *infra*, that

plaintiff-appellant has failed to do so), we must accept as an established fact that, in relation to warning and instructions for use of the product, plaintiff failed to prove any departure from ordinary prudence.

The court's charge to the jury on *strict liability* failed to include any reference to warning or instructions for use. We assume, as did the trial court in considering plaintiff's motion for new trial, that this was error. *See Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993). The trial court concluded, however, that the error was harmless. So do we, though on somewhat different reasoning from that of the trial court because, unlike the trial court, we do not undertake to predict exactly how the Supreme Court of New Hampshire will resolve a novel issue of substantive law on which plaintiff-appellant relies.

II.

It is settled law in New Hampshire that strict liability for product defect includes manufacturing defect, design defect, and warning defect. *See Chellman*, 637 A.2d 148; *see also Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 661 (1st Cir.1981).

New Hampshire cases have not yet determined, however, whether, as appellant asserts, a breach of the strict liability duty to warn can be proved on some basis short of proving failure to exercise ordinary prudence in relation to warning and instructions for use. Stated another way, the undecided question is whether the duty of warning under the strict liability theory requires something

more of the marketer than does the duty of warning under negligence law and, if so, what.

Whether the duty is more onerous is an unsettled question of New Hampshire substantive law. Contrary to appellant's assertion, this question of New Hampshire law was not decided in *Chellman*, 637 A.2d 148. Instead, that was a case in which the plaintiff did not ask the court to submit a negligence claim to the jury. *See id.* at 151. In that context, omission from the trial court's charge of even an instruction on prudent care with respect to warning was reversible error because plaintiff was completely deprived of the opportunity to have the jury consider the duty-to-warn claim. In this case, in contrast, the jury did consider a duty-to-warn claim. They did so under the negligence question. And we must conclude that the jury rejected that claim because they were instructed that they should find for plaintiff in answering the negligence question if they found for the plaintiff on other grounds *or* if they found that defendant failed to use ordinary prudence in relation to warning or instructions for use and that this failure was a cause of any harm sustained by plaintiff.

In three separate avenues of attack, appellant seeks to avoid the preclusive effect of the jury finding of no causal negligence. The first avenue is a two-fold challenge to the finding itself, which we discuss in Part III. We examine the other avenues separately in Parts IV and V.

III.

Appellant has challenged the jury's finding of no causal negligence on two grounds. Appellant asserts that the trial court's duty-to-warn instruction on the negligence count was erroneous. Appellant also asserts that the trial court erred in failing to instruct the jury on the New Hampshire statutory asbestos exposure standard. We conclude that neither of these attacks has merit.

A. The Duty-To-Warn Instruction Given

Appellant challenges the duty-to-warn instruction given by the trial court on the negligence claim. The jury was instructed that the defendant had a duty to warn if it "knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property." Appellant argues that this instruction is erroneous because it requires the plaintiff to prove that the product "was dangerous." Relying on language in *Chellman,* the appellant argues that a defendant has a duty to warn if a product "may be dangerous."

This argument is based more on form than substance. It is difficult to imagine what different meaning would be conveyed by an instruction, instead of that given, that the defendant had a duty to warn if it knew or should have known that the fireproofing it sold to the plaintiff *may* be dangerous. To the extent that this phrasing conveys the same meaning – for example, that the defendant had a duty to warn if the defendant knew or should have known that the product causes harm in some (but not necessarily all) instances – the instruction given by the court was not in error.

To the extent that appellant is urging that its proposed language conveys a different meaning – that the defendant has a duty to warn if it should have known that there was a mere possibility that the product was in the category of dangerous products (i.e., one that causes harm in some instances) – the argument for application of a legal test framed in this particular way has no basis in New Hampshire law.

Under New Hampshire law, a manufacturer need not warn of all potential dangers associated with a product. *See Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (manufacturer need not warn of known, but very unlikely, risk of danger). Similarly, one may infer from this precedent that there is no duty to warn on the basis of speculation that a product might be dangerous. Thus, the meaning conveyed by the court's instruction is closer to the formulations found in New Hampshire cases than is appellant's proposed alteration, which itself is subject to different interpretations, some of which are inconsistent with the formulations in the New Hampshire cases. Thus, appellant's challenge on this ground fails.

B. The New Hampshire Asbestos Exposure Standard

Appellant challenges the trial court's failure to instruct the jury on the New Hampshire standard for indoor nonoccupational asbestos exposure. *See* N.H.Rev.Stat.Ann. 141-E:6. This numerical standard (.01 f/cc) triggers the applicability of certain New Hampshire regulations concerning asbestos abatement procedures used as a part of construction or maintenance.

The court instructed the jury on federal OSHA and EPA regulations, as well as the New Hampshire regulations establishing procedures to be followed during asbestos abatement projects. The court told the jury that the various state and federal statutes were relevant to the issue of damages only and not to the defendant's liability. Since the jury found no liability and therefore did not reach the issue of damages, the court's alleged error in failing to instruct the jury on the New Hampshire asbestos exposure standard is, in retrospect, irrelevant and therefore harmless, unless appellant can establish relevance to liability issues.

Appellant's challenge on appeal contains the implicit assertion that the New Hampshire asbestos exposure standard is relevant to the defendant's liability. The appellant, although objecting to the court's failure to instruct the jury on the New Hampshire statute, did not object to that part of the court's instruction telling the jury that these statutes were relevant to the issue of damages only and not to the issue of liability. The appellant having failed in its objections and request for instruction to articulate an argument for relevancy to liability or any legal basis for relevancy, we review the trial court's instruction only for plain error. *See Poulin v. Greer,* 18 F.3d 979, 982 (1st Cir.1994).

We conclude that it was not plain error, if error at all. The New Hampshire asbestos exposure standard does not impose a rule of conduct on sellers of asbestos products or contractors using asbestos products. Instead, it establishes a threshold of authorization for the director of the Division of Public Health Services to take certain regulatory action, if warranted. *See* N.H.Rev.Stat.Ann. 141-E:8.

In addition, it triggers the applicability of certain safety regulations to asbestos removal and abatement projects at relevant buildings. *See* N.H.Rev.Stat.Ann. 141-E:7.

We conclude that no decision cited to us, and none of which we are aware, establishes a basis for plaintiff's assertion that the New Hampshire asbestos exposure standard is relevant to the defendant's liability. Moreover, given that the New Hampshire state regulators have taken no action with respect to appellant's building, the standard at issue bears only upon the calculation of costs the appellant might incur in the future. For these reasons, we hold that even if there was error in the trial court with respect to this asbestos exposure standard, it was harmless in this case.

IV.

In oral argument and in its brief, appellant asserts that as a matter of substantive law a claimant is entitled to have the court instruct the jury that a claim of strict product liability is to be decided by a jury in a single evaluative finding after jury consideration of all relevant factors. Thus, for example, the appellant argues that if the jury thought there was some evidence of departure from ordinary prudence with respect to warning but not enough evidence for the jury to find departure from ordinary prudence by a preponderance of the evidence, the jury could nevertheless take this evidence into account among all the other factors they considered in deciding whether the product was defective.

Appellant asserted in oral argument before this court that the jury in a strict product liability case is allowed to,

and should be instructed to, make one overall weighing of all factors bearing upon (1) manufacturing defect, (2) design defect, and (3) warning defect. Appellant cites no precedent explicitly supporting this contention, and we are aware of none.

Two independently significant points are implicitly essential to the validity of the argument. We consider each.

A. Consideration of the Cumulative Effect of the Evidence

Appellant's argument depends on an implicit assumption that a claimant need not establish independently, by a preponderance of the evidence, any one of the three separate theories of strict liability (manufacturing defect, design defect, and warning defect).

In the context of this case, appellant argues that the evidence of failure to warn, although not sufficient by itself to support a finding of strict liability by a preponderance of the evidence, may be combined by the jury with any evidence of a design defect and may result in a finding of strict liability by a preponderance of the evidence. In some cases, this would lead to the anomalous result that the jury could find defendant strictly liable by a preponderance of evidence without finding by a preponderance of the evidence a manufacturing defect, a design defect, or a warning defect.

For example, the appellant implies that a plaintiff can prevail if the jury finds none of the three defects by a preponderance of the evidence and yet finds that the

evidence shows a .40 probability of each and, in some unexplained way, a .51 probability of defect in its overall weighing of all evidence received at trial.

This argument is flawed. A .40 probability of each of three separate defects cannot add up to a .51 probability overall. Instead, in this assumed circumstance, unless the three are interdependent (as they may be), there is no better than a .064 probability (.40 X .40 X .40) that all three are true, and neither mathematically nor as a matter of common sense do three .40 probabilities show a .51 probability that one of the three or some combination of two or all three is true.

Moreover, as a matter of settled law, judicial opinions and commentators alike refer to proof of manufacturing defect, design defect, and warning defect as three different ways of proving product defect, not just as factors bearing upon one way of proving product defect. *See Brochu*, 642 F.2d at 661 (discussing separately the "design-defect theory" and the "duty-to-warn theory" with respect to jury instructions under New Hampshire law); *Thibault*, 395 A.2d at 846 (distinguishing policy factors bearing upon strict liability for manufacturing defect from those bearing upon strict liability for design defect and citing James A. Henderson, Jr., "Judicial review of Manufacturers' Conscious Design Choices: The Limits of Adjudication," 73 Colum.L.Rev. 1531 (1973)); *see also* Restatement (Third) of Torts: Products Liability, § 2 cmt. a, Tentative Draft No. 1 (Apr. 12, 1994) (setting forth "separate standards of liability for manufacturing defects, design defects, and defects based on inadequate instructions or warnings," and explaining different sets of policy arguments and objectives for the separate standards); *id.*,

Reporters' Note, at 35-80 (explaining the Reporters' view that the formulation of separate standards for manufacturing, design, and warning defects is consistent with the weight of precedent); Oscar S. Gray, "The Draft ALI Product Liability Proposals: Progress or Anachronism?" 61 Tenn.L.Rev. 1105, 1108 (1994) (although criticizing the ALI Tentative Draft in other respects, accepting the point that "the overwhelming body of interpretation by the courts has accepted the three-pronged differentiation between manufacturing, design, and warning defects").

Appellant cites *Chellman* as holding, or at least implying, that there is only one strict product liability theory in New Hampshire law, and that only one question about the adequacy of plaintiff's proof of strict liability should be submitted to a jury. A close reading of the case, however, does not support the view that *Chellman* addressed the choice between (a) treating manufacturing defect, design defect, and warning defect as separate theories, each involving a distinctive standard for determining liability, and (b) treating the three as merely factors in a single multiple-factors standard for making an evaluative determination that a product is or is not a defective product.

In *Chellman*, the defendant argued that strict liability for design defect and strict liability for failure to warn were distinct, and that the plaintiff had failed to plead a strict-liability-for-failure-to-warn claim. *See Chellman*, 637 A.2d at 151. In deciding that the plaintiff's complaint sufficiently stated a strict liability claim, on the basis of inadequate warning, to meet plaintiff's burden of pleading, *see id.*, the court did not need to or purport to decide

whether proving defective warning and proving defective design in respects apart from warning were two separable ways of proving strict product liability. Thus, *Chellman* neither endorses nor rejects the general proposition that manufacturing defect, design defect, and warning defect are commonly treated by courts and commentators as three separate ways of proving product liability.

The commonly accepted understanding that a plaintiff must establish one or another of the three kinds of defects (manufacturing defect, design defect, or warning defect) by a preponderance of the evidence leaves the jury entirely free to weigh a single item of evidence as relevant to claims of two or even all three kinds of defect. Thus, for example, New Hampshire case law supports the proposition that evidence concerning the existence and adequacy of a warning is relevant not only to a warning defect claim, but also to a design defect claim. *See Chellman*, 637 A.2d at 150; *Reid v. Spadone Machine Co.*, 119 N.H. 457, 404 A.2d 1094, 1097 (1979) ("This condition [the placement of certain buttons on a machine], coupled with inadequate warnings against two-person use, could properly be found to have made the machine 'unreasonably dangerous.' ").

The issue before us now, however, does not concern admissibility of evidence. The jury was free under the court's rulings, absent limiting instructions, to consider all evidence received at trial. In these circumstances, we conclude that the jury's finding of no violation as to the duty-to-warn negligence claim bars the strict-liability-duty-to-warn claim. This is so because in finding that

there was no liability for failure to warn on the negligence theory the jury necessarily found either (1) that plaintiff failed to prove that the defendant's warnings and instructions violated the prudent care standard or (2) that, if the warning was inadequate, plaintiff failed to prove that the inadequacy of the warning *caused* the plaintiff's injury.

Under either of the two possible interpretations of the jury's finding, the jury has determined that plaintiff has failed to prove by a preponderance of the evidence any violation of a duty of prudent care as to warning. This bars the strict-liability-as-to-warning claim unless the law of New Hampshire imposes a more onerous duty than one of prudent care as part of the law of strict product liability.

B. An All-Factors Evaluative Determination

Appellant's weighing-of-all-factors argument, if taken at face value and without qualification, leads implicitly to a surrender of judicial responsibility for instructing the jury to respect the law's outside limits on jury discretion. It is true that appellant's argument for an unlimited all-factors evaluative determination by the jury has a surface plausibility, which may appear to be reinforced by support in some states for application of a standard requiring the jury to "weigh competing factors much as they would in determining the fault of the defendant in a negligence case." *Back v. Wickes*, 375 Mass. 633, 378 N.E.2d 964, 970 (1978). Thus:

> In evaluating the adequacy of a product's design, the jury should consider, among other

> factors, "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

Id. 378 N.E.2d at 970 (quoting *Barker v. Lull Eng'r Co.*, 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978) and citing *Bowman v. General Motors Corp.*, 427 F.Supp. 234, 242 (E.D.Pa.1977)).

The plausibility of appellant's argument is reinforced by the statement of the Supreme Court of New Hampshire in *Thibault* that:

> Inquiry into the dangerousness of a product requires a multi-faceted balancing process involving evaluation of many conflicting factors. . . . Reasonableness, foreseeability, utility, and similar factors are questions of fact for jury determination.

Thibault, 395 A.2d at 846-47; *see also Espeaignnette v. Gene Tierney Co.*, 43 F.3d 1, 5 (1st Cir.1994) (citing *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283 (Me.1988) and discussing the "danger-utility" test used by the Maine courts). Perhaps even more supportive of appellant's argument is another passage from the opinion of the Supreme Judicial Court of Massachusetts in *Back v. Wickes Corp.*:

> In balancing all of the pertinent factors [in deciding whether there was a design defect] the jury makes a judgment as to the social acceptability of the design, and this is the same judgment originally made by the designer of the product.

378 N.E.2d at 970.

Even if one takes these passages to mean that some policy weighing is left to the jury, however, it does not follow that the legal system approves an unlimited all-factors evaluative determination by the jury. Even when approving a multiple-factors-weighing-test for jury use in finding an "ultimate fact," such as product defect, the legal system does not authorize the jury to give whatever weight the jury chooses to arguments of public policy for and against strict liability. To do so would leave to the jury an authority and responsibility that is unguided by any public policy determinations made in statutes and precedents.

Ordinarily issues of public policy are in the first instance appropriate for a legislature's determination by statute and, if not determined by statute, may be determined by a state court of last resort in its decisions setting precedents.

We do not understand appellant's counsel as explicitly arguing for a broad and sweeping jury discretion that extends to public policy issues ordinarily decided by statutes or precedents. We consider the argument in this extreme form, however, because of the procedural posture of this case.

Appellant seeks a new trial despite a supportable jury finding that defendant did not fail to exercise ordinary prudence with respect to warning and instructions for use. This contention, however, is procedurally barred unless plaintiff proffered an instruction or objection clearly giving the trial judge and the opposing party notice of this theory of claim, including a formulation of

an acceptable limit or qualification to distinguish plaintiff's contention from an argument for unlimited jury discretion. Thus, we consider the more extreme implications of the unqualified argument to make the two points that a limit is essential and that the burden is on the plaintiff to propose an acceptable explanation of that limit rather than asking a trial court to leave a jury unguided.

To sustain appellant's argument for a new trial on the procedural record before us, we would have to determine that New Hampshire tort law places no limit on the jury's authority, in reaching the jury's overall evaluative finding in a strict liability case, to weigh all policy arguments (or at least those policy arguments supported by any evidence received in the trial) for and against strict liability, in reaching the jury's overall evaluative finding in a strict liability case.

We cannot say that New Hampshire has adopted, and cannot predict that it will adopt, the novel position that the jury has this authority. Allowing the jury such sweeping authority would be contrary to premises so fundamental that courts only rarely sense a need to advert to them.

The first of these basic premises of settled law concerns the role of precedent in the legal system. A court's acceptance of an argument for a literally "all-factors" evaluative decision by a jury of a strict product liability claim would have the effect of delegating to the jury the authority and responsibility for weighing conflicting arguments of public policy bearing upon the scope and

limits of strict liability and striking the balance that determines the legal system's answer, *case by case.* This would undermine the function of precedent in the legal system – to promote evenhanded decision of like cases alike. Judicial decisions considering similar arguments for jury discretion to weigh public policy arguments have rejected the idea. *See, e.g., Shackil v. Lederle Laboratories,* 116 N.J. 155, 561 A.2d 511, 528 (1989) (the majority, over vigorous dissent, declined to leave to a jury a public policy choice that, it was argued, would drive DPT vaccine for infants off the market); *Bammerlin v. Navistar Int'l Transp. Corp.,* 30 F.3d 898 (7th Cir.1994) (the trial court, not the jury, should have made the evaluative determination whether a truck cab manufacturer complied with federal safety standards); *Bryant v. Tri-County Electric Membership Corp.,* 844 F.Supp. 347 (W.D.Ky.1994) (the court, not the jury, weighed "the public policy goals of protecting consumer and discouraging the sale of defective goods" and held that the strict liability doctrine applied to the services of electric utilities). *But cf. Dawson v. Chrysler Corp.,* 630 F.2d 950, 962-63 (3d Cir.1980), *cert. denied,* 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981) (recognizing the dangers of such a case-by-case determination in the context of motor vehicle safety standards but declining to reverse a judgment entered on a verdict of a jury that was allowed very broad discretion by the trial court's charge).

A second basic premise of settled law is that determinations of liability (whether under a concept of "duty" or "cause" or some other terminology such as "scope of liability") are never exclusively "fact" questions to be decided by a jury, or by a judge as factfinder in a non-jury trial. Even when some disputed issue of historical fact is

relevant, the determination of "duty," "cause," or "scope of liability" is a mixed law-fact determination rather than exclusively a fact question. *See, e.g., Deguio v. United States*, 920 F.2d 103, 105 (1st Cir.1990) (determination of negligence is a mixed question of law and fact and entitled to clear error standard of review); *St. Paul Fire & Marine Ins. Co. v. Caguas Fed. Sav. & Loan Ass'n*, 867 F.2d 707, 708 (1st Cir.1989) ("Negligence and causation are traditionally mixed questions of fact and law."); *cf. Milliken & Co. v. Consolidated Edison Co.*, 84 N.Y.2d 469, 619 N.Y.S.2d 686, 644 N.E.2d 268 (N.Y.Ct.App.1994) ("The existence and scope of an alleged tortfeasor's duty, at the threshold, is a legal, policy-laden determination dependent on consideration of different forces, including logic, science, [and] competing socio-economic policies. . . . ").

When a jury participates in the determination of a mixed-law-fact question, it does so under instructions from the trial judge explaining the legal aspects of the evaluative "finding" the jury makes. *See Kissell v. Westinghouse Electric Corp.*, 367 F.2d 375, 376 (1st Cir.1966) (special interrogatories to the jury can be mixed questions of law and fact, if the jury is properly instructed as to the law); *see also Chellman*, 637 A.2d at 151 ("Clear and intelligible jury instructions are particularly important to explain complex or confusing legal concepts.").

In the face of these settled principles, no decision cited to us, and none of which we are aware, in New Hampshire or elsewhere, requires the submission to the jury of a single evaluative question determining a strict liability claim. We conclude that, in deciding this appeal in a diversity case, we should not predict an expansion of strict liability under New Hampshire law to the extent of

permitting juries a discretion not guided by instructions on the limits set by the public policy choices, explicit and implicit, in New Hampshire statutes and precedents. *Cf. Thibault*, 395 A.2d at 847 (indicating that the strict liability cause of action is narrower in New Hampshire than in some other jurisdictions); *Bagley v. Controlled Environment Corp.*, 127 N.H. 556, 503 A.2d 823, 826 (1986) (discussing *Buttrick v. Lessard*, 110 N.H. 36, 260 A.2d 111 (1969) and stating that the strict liability actions are limited to claims for which requiring a plaintiff to prove negligence would pose "a practical barrier to otherwise meritorious claims").

V.

Remaining for consideration is appellant's argument that even if the jury should not be allowed such sweeping discretion, at least appellant should be allowed a new trial to seek a jury finding under an instruction on duty to warn somewhat more burdensome to a defendant than merely a duty of ordinary prudence. This issue, however, is the question stated at the beginning of this Opinion. It is the interesting question that, on federal procedural grounds, we conclude we should not reach in this case. Not having objected precisely on this ground and not having proposed to the trial judge an acceptable instruction to the jury on a question that, viewed most favorably to appellant, is a mixed-law-fact question, appellant is precluded from advancing this contention now.

Plaintiff's requests for instruction and objection to the charge, generously construed in plaintiff's favor, were sufficient, we assume, to alert the trial judge to plaintiff's

contention that a departure from ordinary prudence with respect to warning and instructions for use would render the product defective for the purpose of plaintiff's strict liability claim. In its denial of the motion for new trial, the trial court conceded that its instruction had been in error in this regard.

Apart from this ground of request and objection, however, plaintiff proffered no form of instruction on duty to warn as part of the strict liability claim. For this reason, the request and objection were not specific enough to preserve any other issue with respect to the strict liability instruction for consideration on motion for new trial or on appeal. *See* Fed.R.Civ.P. 51; *see also Jordan v. United States Lines, Inc.*, 738 F.2d 48 (1st Cir.1984) (holding that appellant's objection to the trial court's instruction on the definition of "unseaworthiness" was not specific enough to satisfy Rule 51). Moreover, even in the brief before this court and on oral argument, appellant has failed to propose any instruction that would define the issue or issues left to be tried after we accept, as already tried and fairly determined, the issues decided by the jury verdict.

The jury findings (which we have determined are not undermined by any of appellant's attacks) must stand. And, as we have noted, appellant has not proffered any definition of an issue, for which there is support in precedent or in reason, left to be tried on new trial. To remand for new trial without providing any guidance about the issue or issues to be tried would be inappropriate. And, of course, it would be manifestly unfair to set aside the fairly determined jury findings and award a new trial

without limitation. Thus, we affirm the trial court's denial of the plaintiff's motion for new trial.

CONCLUSIONS

First. Plaintiff-appellant's challenges to the jury findings on the basis of the instructions given on duty to warn in negligence are without merit and the jury findings establish that plaintiff failed to prove causal negligence in any relevant way (including due care in warning and instructions for use) and plaintiff failed to prove that defendant is strictly liable on any ground apart from failure to warn.

Second. Plaintiff-appellant's requests for instruction and objection to the charge on the strict liability claim were not sufficient to preserve on motion for new trial and on appeal the contention that, under New Hampshire law, the duty to warn as a part of a strict liability claim requires more of a defendant than does the duty to warn in a negligence claim.

Third. New Hampshire substantive law does not require that a product defect be determined on the basis of an unlimited all-factors weighing by a jury, unguided by statutory and decisional limitations on the scope of strict liability.

Fourth. In light of these conclusions, the jury's verdict in defendant's favor on the duty to warn as part of the negligence claim precludes a finding in plaintiff's favor on the duty to warn as part of the strict liability

claim, and any error of the trial court with respect to the instruction on strict liability was harmless.

Judgment for defendant is AFFIRMED, with costs.

CHESHIRE MEDICAL CENTER, Plaintiff

v.

W.R. GRACE & CO. and W.R. Grace & Co.-Conn., Defendants.

No. CV-88-516-M.

United States District Court,
D. New Hampshire.

May 24, 1994.

Building owner brought suit against asbestos manufacturer for damage to its building allegedly resulting from installation of asbestos-containing fireproofing. Following jury verdict for manufacturer, building owner moved for new trial. The District Court, McAuliffe, J., held that: (1) building owner was not prejudiced by court's omission of failure-to-warn instruction relating to strict liability; (2) court's instruction properly directed jury's attention to those dangers that were foreseeable; (3) court's failure to instruct on New Hampshire statutes governing asbestos exposure levels and its failure to inform jury that defendant's fireproofing inevitably had to be removed from the building was harmless; (4) it was within trial court's discretion to permit inquiry beyond traditional strictures of cross-examination; and (5) building owner's proffered videotape was not proper rebuttal evidence.

Motion denied.

Daniel A. Speights, Hampton, SC, Michael P. Hall, Manchester, NH, for plaintiff.

Richard V. Wiebusch, Manchester, NH, Harry T. Daniels, Boston, MA, for defendants.

ORDER

McAULIFFE, District Judge.

Plaintiff Cheshire Medical Center ("Cheshire") sued W.R. Grace & Co. and W.R. Grace & Co.-Conn. (collectively "W.R. Grace") for damage to its building allegedly resulting from the installation of asbestos-containing fireproofing manufactured and supplied by defendant. Cheshire sought recovery under three theories of liability: negligence, strict liability, and breach of implied warranty. After an eighteen day trial, the jury returned a verdict for defendant on all three counts.

Cheshire now moves for a new trial, asserting evidentiary errors and errors in the jury charge.

I. Standard of Review

A motion for a new trial will be granted if a court has committed an error that adversely affects the moving party's substantial rights. Fed.R.Civ.P. 61; *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553-54, 104 S.Ct. 845, 848-49, 78 L.Ed.2d 663 (1984). Harmless error is not grounds for a new trial. Fed.R.Civ.P. 61.

II. Jury Instructions

A. Strict Liability Failure to Warn

Cheshire's soundest claim relates to the court's failure to specifically instruct on defendant's "duty to warn" relative to Cheshire's strict liability theory. The court instructed the jury that W.R. Grace's failure to warn of any foreseeably dangerous uses of its product would

constitute a breach of a duty owed to the plaintiff under the law of negligence. However, the court did not specifically instruct the jury that W.R. Grace's failure to warn could also render its fireproofing product unreasonably dangerous for purposes of strict liability. Cheshire argues that the court's omission of a failure-to-warn instruction on its strict liability count amounted to prejudicial error requiring a new trial.[1]

In this diversity case, consideration of Cheshire's assertion of error necessarily begins with a review of applicable New Hampshire law. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). New Hampshire's strict liability law is different from that of many other jurisdictions that have adopted section 402A of the *Restatement (Second) of Torts*. Here, strict liability does not mean "liability without fault." *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466, 469-70, 543 A.2d 407, 409 (N.H.1988); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 806, 395 A.2d 843, 845-46 (N.H.1978). New Hampshire explicitly rejects the view that strict liability should serve as a no-fault compensation system or a means for spreading risk in society. *Thibault*, 118 N.H. at 806, 395 A.2d at 845-46. Rather, in this state strict liability actions are limited to claims arising from defective products where requiring a plaintiff to prove negligence would pose "a practical barrier to otherwise meritorious claims." *Bagley v. Controlled Environment Corp.*, 127 N.H. 556, 560, 503 A.2d 823, 826 (N.H.1986); *see also Buttrick v. Arthur Lessard*

---

[1] If prejudicial error, relief would presumably extend only to granting a new trial on the strict liability count.

& Sons, Inc., 110 N.H. 36, 39, 260 A.2d 111, 113 (N.H.1969).

Under New Hampshire's law of products liability, "[t]he duty to warn is part of the general duty to design, manufacture, and sell products that are reasonably safe for their foreseeable uses." *Chellman v. Saab-Scania AB*, 138 N.H. 73, 78, 637 A.2d 148, 150 (N.H.1993). If the design of a product makes a warning necessary to avoid an unreasonable risk of harm from a *foreseeable* use, the lack of warning (or an inadequate warning) is sufficient to make the product defective and unreasonably dangerous. *See id.* (citing Restatement (Second) of Torts § 402A, cmts. h and j); *see also Thibault*, 118 N.H. at 808, 395 A.2d at 846-47. This duty to warn "is limited to foreseeing the probable results of the normal use of the product or a use that can reasonably be anticipated." *Thibault*, 118 N.H. at 808, 395 A.2d at 847 (quoting *McLaughlin v. Sears, Roebuck & Co.*, 111 N.H. 265, 268, 281 A.2d 587, 588 (N.H.1971)). A manufacturer is not required to warn against obvious dangers or absurd uses of a product because "individual consumers have certain responsibilities" to avoid unreasonable and unintended uses of a product. *Id.*

In *Chellman v. Saab-Scania AB, supra*, the New Hampshire Supreme Court held that a trial judge's refusal to give a failure-to-warn instruction on plaintiff's strict liability claim for defective design was reversible error. The jury in that case had been instructed on the general rule of strict liability for design defects, but "the charge did not explain that the jury could consider whether failure to warn of a foreseeable danger made the product defective." *Chellman*, 138 N.H. at 79, 637 A.2d at 151. Although

the jury found by special verdict that the product contained no design defects which would make it unreasonably dangerous, the supreme court held that "[c]onsideration of a warning, or lack thereof, *as part of the analysis of design defect*, is not obvious to a jury and must be explained through proper instruction. . . . " *Id.* (emphasis added). Because the jury instructions in *Chellman* "could have misled the jury as to the proper considerations for determining design defect," the trial court's failure to instruct on the manufacturer's duty to warn could not be deemed harmless error. *Chellman*, 138 N.H. at 80, 637 A.2d at 152.

In this case, Cheshire advanced two related claims: It alleged (1) that W.R. Grace's failure to place a warning on its fireproofing product was negligent, and (2) that the absence of a warning also rendered the fireproofing unreasonably dangerous. The court instructed the jury on plaintiff's negligence claim, in part, as follows:

> In determining whether or not the defendant was negligent you must consider whether the defendant breached any duties owed to the plaintiff.
>
> 1. Duty to Warn
>
> If the defendant knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property, the defendant had a duty in the exercise of reasonable care to inform purchasers of the fireproofing of that danger. The defendant had a continuing duty to warn the plaintiff of dangers associated with the fireproofing even after the sale of the fireproofing to the plaintiff if the defendant discovered after

the sale that the product was defective or dangerous.

2. Duty to Acquire Knowledge

The defendant, as a manufacturer, had a duty to be aware of available scientific knowledge concerning the health hazards associated with the asbestos contained in its fireproofing. Manufacturers are presumed to possess the skill and knowledge of experts in their business, and to possess expert knowledge concerning the materials and processes available to the industry.

3. Duty to Test for Defects

The defendant had a duty to use reasonable care to test its product to discover any latent or hidden defects. The defendant had a duty to test its fireproofing to see if it would release hazardous asbestos fibers during normal and foreseeable conditions of building use and maintenance.

Jury Instructions (Court Exhibit no. 2) at 16-17. The strict liability charge included the following instruction:

2. Unreasonably Dangerous Condition

A product is unreasonably dangerous if it poses a danger to an extent beyond that which may be contemplated by the ordinary consumer who purchases it, and who possesses the degree of knowledge as to its characteristics common to the community of persons intended to purchase and use the product.

In deciding whether the fireproofing product presents an unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if

> you decide that the fireproofing is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; liability may exist if the manufacturer, W.R. Grace, did not take available and reasonable steps to lessen or eliminate the danger of even a useful and desirable product. A manufacturer is not obliged to design the safest possible product, or a safer product, or one as safe as others make, so long as the product it designed is not unreasonably dangerous.

Jury Instructions (Court Exhibit no. 2) at 19-20.

As noted, if a defendant's failure to warn is properly at issue in a strict liability design defect case, *Chellman* requires that the jury be instructed specifically on that point. Here W.R. Grace argues that this court's instruction directing the jury to consider whether defendant could have taken any "available and reasonable steps to lessen or eliminate the danger" posed by its product adequately informed the jury of the appropriate considerations, including whether the absence of a warning rendered the fireproofing product defective. The court respectfully disagrees.

The *Chellman* decision emphasized the possibly confusing or misleading aspects of a general instruction on defective design. The "available and reasonable steps" language of the strict liability instruction given in this case did little if anything to explain how a "non-obvious" duty to warn might relate to the issue of design defect. Because the instruction given did not specifically inform the jury that the manufacturer's failure to warn could be

relevant to the existence of an unreasonably dangerous design defect, *Chellman* compels the conclusion that the court's omission of a strict liability failure-to-warn instruction in this case was indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability count, if the error affected its substantial rights.

In general, negligence and strict liability causes of action derive from distinct theories. Negligence focuses on the defendant's conduct, while strict liability focuses on the defendant's product. With respect to a manufacturer's failure to warn of a product's dangers, however, the distinction between negligence and strict liability is less apparent. Some courts have found no material distinction between the two causes of action where the strict liability duty to warn involves primarily negligence principles. *See, e.g., Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1231 (1st Cir.1990) (applying Massachusetts law), *vacated*, ___ U.S. ___, 112 S.Ct. 3019, 120 L.Ed.2d 891 (1992), *reaff'd on remand*, 981 F.2d 7 (1st Cir.1992); *Werner v. Upjohn Co.*, 628 F.2d 848, 858 (4th Cir.1980), *cert. denied*, 449 U.S. 1080, 101 S.Ct. 862, 66 L.Ed.2d 804 (1981); *Gonzalez v. Volvo of America Corp.*, 752 F.2d 295, 300 (7th Cir.1985) (per curiam) (applying Indiana law); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 466 (7th Cir.1984) (applying Wisconsin law).

In *Kotler v. American Tobacco Co., supra*, the plaintiff brought claims for negligence and breach of warranty[2]

---

[2] Massachusetts law does not provide for causes of action based on strict liability. However, warranty actions in

based on defendant's alleged failure to warn of dangers associated with smoking cigarettes. In that case the trial court directed a verdict in defendant's favor on the warranty claim, and the jury subsequently returned a verdict for the defendant on the negligence claim. On review, the Court of Appeals for the First Circuit held that the trial court erred in directing a verdict on the warranty claim, but, despite the error, a new trial was not warranted. *Kotler,* 926 F.2d at 1228, 1235. The Court determined that, under Massachusetts law, the only difference between the duty to warn under warranty and negligence theories is the level of knowledge attributed to a manufacturer: in warranty, the manufacturer is held to possess the knowledge of an expert and not simply, as in negligence, that of an ordinary, reasonable person. *Kotler,* 926 F.2d at 1232; *but see Simmons v. Monarch Machine Tool Co.,* 413 Mass. 205, 207 n. 3, 596 N.E.2d 318, 320 n. 3 (Mass.1992) (clarifying Massachusetts law concerning relevance of vendor's state of knowledge in warranty action).

The trial court in *Kotler* instructed on the negligence duty to warn, but mistakenly directed the jury to hold the defendant to the more demanding standard of expert knowledge associated with the warranty duty. Had the court instructed on the plaintiff's warranty claim, the jury would have been asked to apply that same standard of knowledge in determining warranty liability. The Court

---

Massachusetts are analogous to and coextensive with strict liability actions in other jurisdictions that have adopted § 402A of the Restatement. *See Allen v. Chance Manufacturing Co.,* 873 F.2d 465, 466 n. 2 (1st Cir.1989); *Correia v. Firestone Tire & Rubber Co.,* 388 Mass. 342, 355, 446 N.E.2d 1033, 1039 (1983).

of Appeals concluded that the plaintiff in *Kotler* had not been prejudiced by the trial court's erroneous disallowance of the warranty claim because the jury's verdict for the defendant on the negligence claim presupposed an identical and consistent finding for the defendant on the warranty theory. *Kotler*, 926 F.2d at 1235. In other words, because the jury found no breach of the higher warranty duty to warn (albeit in the context of a negligence claim), such a finding would have necessarily precluded a verdict for the plaintiff on a warranty claim.

Under New Hampshire law, the strict liability duty to warn requires only that a manufacturer warn of *foreseeable* dangers associated with the normal or *foreseeable* use of its product. *See Chellman*, 138 N.H. at 78, 637 A.2d at 150; *Thibault*, 118 N.H. at 808, 395 A.2d at 846-47. "Foreseeability" is a negligence principle, determined by reference to what the manufacturer knew or should have known at a particular time. New Hampshire has yet to hold a manufacturer to a heightened state of knowledge concerning the dangers associated with its product. *Cf. Kotler*, 926 F.2d at 1232 (discussing "expert" and "perfectly developed" states of knowledge). A product may be unreasonably dangerous in the absence of a warning, but in New Hampshire a manufacturer is not strictly liable for failing to warn of the danger unless that danger is foreseeable. Issues of causation and harm being identical, under New Hampshire law the strict liability duty to warn appears to be indistinguishable from the negligence duty to warn.[3]

---

[3] A strict liability failure-to-warn instruction was not included in the proposed jury instructions submitted to the

In this case, the jury instructions regarding Cheshire's negligence claim included a full explanation of the duty to warn. The negligence instructions also required the jury to hold the defendant to a standard of expert knowledge "concerning the health hazards associated with the asbestos contained in its fireproofing . . . and the materials and processes available to the industry." Jury Instructions, *supra*. The jury was further instructed that "[t]he defendant had a duty to test its fireproofing to see if it would release hazardous asbestos fibers during normal and foreseeable conditions of building use and maintenance." *Id.*[4]

Relying on these instructions, the jury found that W.R. Grace's failure to include a warning on its fireproofing did not constitute a breach of the negligence duty to warn of foreseeable dangers. Because the duty to warn relative to strict liability is identical to the duty to warn under negligence, and all other matters were resolved against plaintiff, the jury's verdict on the negligence count necessarily precluded a finding in plaintiff's favor

---

court. *See* Plaintiff's Proposed Jury Instructions (document no. 151). Cheshire's counsel requested such an instruction for the first time at sidebar after the charge had been given to the jury, but did not suggest a particular formulation of the charge. Transcript, Nov. 2, 1993, at 110-11. In the absence of a proposed instruction from plaintiff, the court's own strict liability failure-to-warn instruction would have likely closely resembled the negligence duty-to-warn instruction had the court properly charged the jury on this issue following Cheshire's objection.

[4] By contrast, the jury charge in Chellman contained no references whatsoever to a duty to warn under any theory of liability.

with respect to the strict liability duty to warn. Accordingly, although it was error not to do so, Cheshire was not prejudiced by the court's omission of a failure-to-warn instruction relating to strict liability.[5]

B. Duty to Warn Standard

Cheshire also objects to the negligence duty-to-warn instruction given by the court. The jury was instructed that W.R. Grace had a duty to warn if it "knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property."[6] Jury Instructions (Court Exhibit no. 2) at 16. Cheshire insists that the court should have instructed that reasonable care required W.R. Grace to warn purchasers if and when it knew or should have known that its product "might be dangerous."

The standard Cheshire advocates lacks support in New Hampshire law. In *Thibault v. Sears, Roebuck & Co., supra,* the New Hampshire Supreme Court held that a

---

[5] It may be worth noting that if it was reasonable (i.e., not negligent) for W.R. Grace not to place warnings on its product (as the jury determined), then any unreasonable danger that existed would appear to concern simply a deficiency in the design itself. *See Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 657 n. 6 (1st Cir.1981). Of course, the jury in this case also found that the design was neither defective nor unreasonably dangerous.

[6] The jury instructions defined "property damage" as a release of respirable asbestos fibers posing an unreasonable health risk. Jury Instructions (Court Exhibit no. 2) at 14.

manufacturer need not warn of all potential and speculative dangers associated with its product. *Thibault*, 118 N.H. at 808, 395 A.2d at 846-47 (manufacturer need not warn of known, but very unlikely, risk of danger). As discussed above, the duty to warn is limited under New Hampshire law to foreseeable dangers arising from foreseeable uses of the product.

The scope of a manufacturer's duty to warn is a function of its concomitant duties to acquire knowledge about the product and to test the product for defects. "Foreseeability" – i.e., what a manufacturer "knew or should have known" about the dangers of its product – is substantially determined by the knowledge a manufacturer "should have" acquired, and the tests it "should have" conducted. The instruction given by the court stated that W.R. Grace had a duty to warn of all dangers of which it knew or should have known. Subsequent instructions stated that W.R. Grace was deemed to possess the knowledge of an expert and was required to have adequately tested its fireproofing for non-obvious defects. According to these instructions, if the available scientific knowledge and testing had not revealed a particular danger, then the jury could not conclude that W.R. Grace "should have known" of such a danger or that it had a duty to warn consumers about it.

Cheshire argues that the instruction given mistakenly informed the jury that W.R. Grace was only required to warn of dangers that were "certain." This argument misses both the import of the court's instruction and the meaning of the word "danger." Something is "dangerous" if it has the *potential* to cause harm. A dangerous product is one that poses a *possibility* or *risk* of harm,

rather than a certainty of harm. By comparison, something "might be dangerous" if it *possibly* could have the *potential* to cause harm.

The jury in this case was not instructed that W.R. Grace had a duty to warn only of dangers that are "certain." Rather, the instruction imposed on W.R. Grace the duty to warn of *foreseeable risks of harm* to people or property – that is, "dangers" of which it "knew or should have known."[7] If it had been given, Cheshire's "might be dangerous" instruction would have erroneously implied that W.R. Grace was required to warn of all possible dangers, whether foreseeable or not. As has been discussed, New Hampshire law does not require a manufacturer to warn against such speculative risks. The court's instruction properly directed the jury's attention to those dangers that were foreseeable.[8]

---

[7] The instructions cited by plaintiff from *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652 (1st Cir.1981), and *Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir.1987), are consistent with this analysis. *See* Plaintiff's Motion for a New Trial at 9.

[8] This instruction is consistent with the "continuing duty-to-warn" instruction proposed by Cheshire which requires W.R. Grace to warn of any dangers that it "discovered" after the sale of the fireproofing. *See* Plaintiff's Proposed Jury Instructions No. 28; Jury Instructions (Court Exhibit no. 2) at 16.

C. Other Alleged Errors

Cheshire's final objections to the jury charge concern the court's failure to instruct on the New Hampshire statutes governing asbestos exposure levels as well as its failure to inform the jury that W.R. Grace's fireproofing must inevitably be removed from Cheshire's building.

The court specifically instructed the jury that the various state and federal statutes and regulations applicable to asbestos-containing material could not be considered in determining W.R. Grace's liability, but were relevant only to the nature and extent of plaintiff's damages. Jury Instructions (Court Exhibit no. 2) at 38-41. *See, e.g., Adams-Arapahoe School Dist. No. 28-J v. GAF Corp.*, 959 F.2d 868 (10th Cir.1992). Cheshire did not object to the court's instructions on this point. *See* Transcript, Nov. 2, 1993, at 107-31. Having decided the issue of liability in defendant's favor, the jury of course never reached the issue of damages. Consequently, even if error, plaintiff could not have been prejudiced by the court's omission of specific instruction on New Hampshire's statutes.

Cheshire also objects to the court's failure to instruct the jury that the federal NESHAP regulations required all of the asbestos-containing fireproofing to be removed upon demolition of the building and that such demolition was "inevitable." As an initial matter, the court did instruct the jury that the NESHAP regulations, about which the jury heard extensive testimony, "apply only when a certain amount of asbestos-containing material is disturbed or when a building containing such material is demolished." Jury Instructions (Court Exhibit no. 2) at 39.

Consistent with its instructions concerning the requirements of other regulations, the court permitted the jury to decide, based on the evidence, whether the building would in fact be demolished: "It is for you, as the finders of fact in this case, to decide what methods of dealing with the Monkote-3 fireproofing are reasonable under the circumstances and to calculate damages accordingly." *Id.* at 38. The jury was further instructed that if W.R. Grace were found liable for damages, Cheshire was entitled "to recover an amount that will fairly compensate it for all reasonable costs incurred to date or to be incurred in the future, in relation to the management, control, repair, or *removal* of the asbestos-containing fireproofing in its building." *Id.* (emphasis added).[9] In any event, this objection, too, is relevant only on the damages issue, which the jury never reached. Because the jury never reached the question of the "inevitability" of the fireproofing's removal, Cheshire could not have been prejudiced.

---

[9] That *demolition* of this building is "inevitable" is not entirely free from doubt. *But see Greenville v. W.R. Grace & Co.*, 827 F.2d 975, 982 (4th Cir.1987). The building may be demolished twenty, fifty, or even one hundred years from now, or it may remain standing until time and decay reduce it to rubble. Mr. Frazier, the safety officer at Cheshire Medical Center, testified at trial that there were no current plans to demolish the building, and he declined to estimate the probable life of the building. *See* Transcript, Oct. 18, 1993 a.m. at 41-42. On such evidence, the jury would have had no basis for calculating the present value of the removal costs upon demolition at some unspecified future date.

III. Evidentiary Rulings

A. Fed.R.Evid. 611(b)

Cheshire next argues that the court improperly allowed W.R. Grace to question Cheshire witnesses during its case-in-chief relative to Grace's statute of limitations defense. Citing Fed.R.Evid. 611(b), Cheshire complains that defendant's "open cross" of its witnesses "allowed Grace to improperly divert the jury's attention away from Cheshire's case-in-chief and toward Grace's statute of limitations defense, forcing Cheshire to reshape its own case and to anticipate and defend against an issue that was prematurely allowed into evidence." Plaintiff's Motion for a New Trial at 20. This contention lacks merit.[10]

Rule 611(b) is clear:

> Cross-examination *should* be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court *may*, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

Fed.R.Evid. 611(b) (emphasis added). This general directive is suggestive rather than mandatory, and is subject to a trial judge's discretion regarding the proper scope of questioning. *See* Fed.R.Evid. 611(b), Advisory Committee's Note (citing cases). The Court of Appeals for this

---

[10] Cheshire prevailed on the statute of limitations defense, so it was not directly prejudiced as to that matter. Cheshire argues, however, that the court's ruling prejudiced its liability case.

circuit has consistently recognized the broad discretion accorded trial judges in determining the scope of cross-examination. *See Losacco v. F.D. Rich Constr. Co.*, 992 F.2d 382, 385 (1st Cir.) ("Of course, trial judges, within their discretion, may disregard Rule 611(b)."), *cert. denied*, ___ U.S. ___, 114 S.Ct. 324, 126 L.Ed.2d 270 (1993); *United States v. Akitoye*, 923 F.2d 221, 225 (1st Cir.1991) (citing the "broad discretion accorded to federal trial judges in delimiting the scope of cross-examination"); *United States v. Keithan*, 751 F.2d 9, 11 (1st Cir.1984) ("It is axiomatic that the trial court is given wide discretion in controlling the scope of cross-examination."). Subdivision (a) of Rule 611 describes considerations relevant to the court's exercise of this discretion:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed.R.Evid. 611(a).

Cheshire's protestations notwithstanding, W.R. Grace was not allowed to conduct "open cross" of plaintiff's witnesses (i.e., cross-examination regarding any matter relevant to any issue in the case). In response to Cheshire's objection that W.R. Grace's anticipated cross-examination would cause extensive delay and would prejudice Cheshire's case, the court ruled as follows:

> I have no intention, Mr. Speights, of allowing the defendants to use the cross-examination to

> put their case in and charge you with that time. I'm going to charge that time to the defendants.
>
> But I think in ordering the proof and managing the trial in the most efficient way and the most comprehensible way for the jury, it makes sense to allow the defendants to cross-examine on the issue of statute of limitations, because it's a defense you are aware of. It's been moved on summary judgment at least twice that I'm aware of. It's not a surprise. All the witnesses are aware of it. To have the witnesses testify, limit cross, and then bring them back in the defendants' case is just an inefficient and ineffective use of resources.

Transcript, Oct. 8, 1993 a.m. at 56. The court further clarified this ruling by admonishing W.R. Grace's counsel not to "attempt to convert the witness to an expert for the defense." *Id.* at 106.

> In other words, I can't tell, Mr. Daniels, where you are going sometimes. If you are eliciting from him factual matters within his knowledge that reflect on some evidence later that you are going to tie into [what] they should have known in the 1970's, that's fine. But I don't want you to ask this witness if he has an opinion as to whether building owners, for example, in the 1970's should reasonably have known that asbestos in buildings posed a contaminant hazard.

Id. at 106-07. Thus, the court limited cross-examination to matters relating to the statute of limitations issue within the witness's knowledge and not to any other relevant matters.

The trial in this case lasted several weeks and involved many fact and expert witnesses. The parties' multiple theories of liability and defense compounded the complexity of the case, requiring the jury to apply difficult legal principles to complicated, often technical, evidence. Under these circumstances, the court finds that it was within its discretion to permit inquiry beyond the traditional strictures of cross-examination. In addition to promoting efficiency, the court's ruling was designed to facilitate the jury's comprehension of the evidence, without compromising effective presentation. *See supra.*[11]

Dicta cited by Cheshire from *MDU Resources Group, d/b/a Montana-Dakota Utilities Co. v. W.R. Grace & Co.*, 14 F.3d 1274 (8th Cir.1994), does not compel a different view. In that case, the trial judge contradicted a prior ruling and actively encouraged the defendant to explore its statute of limitations defense during the plaintiff's case-in-chief. Reversing the verdict for the defendant (on other grounds), the Court of Appeals for the Eighth Circuit remarked "by way of guidance" that "although the scope of cross-examination is within the discretion of the trial court, it should not be allowed to get out of hand." *MDU Resources*, 14 F.3d at 1282. It appears from the appellate court's characterization of the record in that case, and from Cheshire's own representations to this court about the *MDU Resources* trial, *see* Transcript, Oct. 8, 1993 a.m.

---

[11] Early in this litigation the *defendant*, W.R. Grace, moved to bifurcate the trial so that the statute of limitations issue could be tried separately. *See* document no. 69. Although bifurcation would have eliminated Cheshire's current complaint, Cheshire objected strenuously to bifurcation, *see* document no. 72, and the motion was denied.

at 49, 55 (describing extensive delay resulting from "open cross"), that the cross-examination allowed here did not approach the broad inquiry which "[got] out of hand" in *MDU Resources*.[12]

Lis v. Robert Packer Hospital, 579 F.2d 819 (3rd Cir.), *cert. denied*, 439 U.S. 955, 99 S.Ct. 354, 58 L.Ed.2d 346 (1978), another case relied upon by Cheshire, is also distinguishable. The district judge in that case apparently permitted "open cross" as a general rule in *every* case, unless circumstances required otherwise. The Court of Appeals for the Third Circuit criticized that practice, emphasizing that Rule 611(b)

> does not confer upon a federal judge "the right to permit inquiry beyond the scope of the direct . . . in every case." Rather, the general prescription is precisely the opposite. Any right to counter the stated procedure is granted to the trial court only "in the exercise of discretion." To follow the practice announced by the trial judge in this case is not to exercise discretion; it is to use no discretion whatever.

---

[12] The Eighth Circuit Court of Appeals further cautioned that when cross-examination goes beyond the scope of direct, the examiner must not ask leading questions of a non-hostile witness. *MDU Resources*, 14 F.3d at 1282. In this case, Cheshire does not object to the form of questions posed by counsel for W.R. Grace, nor did it make such an objection at trial. Cheshire confines its objections to the scope of cross-examination, not the mode of questioning.

Lis, 579 F.2d at 823. By contrast, the court's ruling on cross-examination here did not manifest a general practice, but constituted an exercise of discretion based on reasons unique to this particular case.

The question of discretion aside, examination of the record reveals that most of the cross-examination questions to which Cheshire objected on this ground actually fell within the scope of direct examination and did not implicate Fed.R.Evid. 611(b). In its motion for a new trial Cheshire specifically objects only to W.R. Grace's cross-examination of William Ewing, one of Cheshire's experts who testified during its case-in-chief and on rebuttal. Mr. Ewing, an industrial hygienist, testified as an expert regarding asbestos contamination of buildings and federal and state regulation of asbestos management and removal activities. During his initial cross-examination, counsel for W.R. Grace asked questions which, although relevant to the statute of limitations issue, also probed the witness's qualifications as an expert and the bases for his opinions, inquiry properly within the scope of direct examination. *See* Transcript, Oct. 8, 1993 a.m. at 91-92, 99-100, 167. Cheshire's other objections were either sustained by the court, *see id.* at 93, 111, or rendered moot due to Mr. Ewing's inability to answer the question, *see id.* at 114. Similarly, during cross-examination on rebuttal, Mr. Ewing either did not answer the allegedly objectionable question, *see* Transcript, Nov. 1, 1993 a.m. at 74, or the question properly concerned the bases for his opinion about the contamination of plaintiff's building, *see id.* at 75-77.

In these circumstances, Cheshire's assertions of "severe prejudice" from being "forced" to alter its "normal and successful strategy" lack merit. Cheshire has not demonstrated that it was prejudiced or that it is entitled to a new trial. *See Lis*, 579 F.2d at 824-25.

B. Videotape

Cheshire argues that it is entitled to a new trial because the court improperly excluded a videotape offered to rebut the testimony of defendant's witnesses, Thomas Feit and Richard Lee. The videotape showed the fireproofing in Cheshire's building being brushed with a toothbrush, purporting to illustrate the friable nature of the material. The tape was recorded on October 27, 1993, while trial was in progress and without notice to W.R. Grace. It was offered in evidence five days later on November 1, 1993, along with the testimony of Mr. Ewing to explain it. The court excluded the videotape on grounds that it was cumulative evidence. Transcript, Nov. 1, 1993 a.m. at 33-34.

Evidence may be introduced on rebuttal only to refute new facts brought out during the defendant's case-in-chief. *See Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554, 555 (5th Cir.1979). What constitutes proper rebuttal evidence is a matter committed to the discretion of the trial judge. *See Lubanski v. Coleco Industries, Inc.*, 929 F.2d 42, 47 (1st Cir.1991).

During its case-in-chief, the court afforded Cheshire wide latitude in demonstrating the fireproofing's friability to the jury. Using a toothbrush and tongue depressor, Mr. Frazier showed the jury how fireproofing

attached to a section of beam, which had been removed from plaintiff's hospital, broke down and presumably released fibers when disturbed. Transcript, Oct. 19, 1993 a.m. at 15-18. 63-67. Cheshire did not offer the beam in evidence.

After one of defendant's experts, Dr. Richard Lee, criticized that demonstration as unrepresentative of the material's characteristics, Transcript, Oct. 29, 1993 a.m. (I) at 10-11, the court allowed Cheshire to introduce bulk samples of fireproofing taken from its facility. Dr. Lee agreed that a more representative illustration of friability could be obtained using these samples. *Id.* at 37, 47-58; Transcript, Oct. 29, 1993 a.m. (II) at 5, 13-14. The jury was permitted to see and handle the bulk samples, under appropriate precautions.

Cheshire did not attempt to introduce a videotaped demonstration of friability during its case-in-chief, but argues that the tape was necessary on rebuttal in response to Thomas Feit's testimony that a videotape of the fireproofing intact in the hospital would provide the most representative demonstration of friability. The videotape was also expected to undermine Dr. Lee's remaining criticisms of the representative character of the bulk samples of fireproofing.

Cheshire's interpretation of the evidence is somewhat strained. The record shows that Mr. Feit testified only that a videotape would give the jury "a representation of what [the fireproofing] *looked like*" and that "[i]t would be like standing on the floor *looking up at it in person.*" Transcript, Oct. 25, 1993 a.m. at 7. He did not testify that the tape would be the best evidence of friability. In fact,

both Mr. Feit and Dr. Lee testified that the best way to evaluate the friability of the fireproofing in a courtroom setting would be to remove a very large section of the material, including the beam, such that disturbance of the fireproofing at the center of the section would be minimized. *See* Transcript, Oct. 25, 1993 a.m. at 5-6 (Mr. Feit); Transcript, Oct. 29, 1993 a.m. (II) at 15 (Dr. Lee).

Cheshire's proffered videotape was not proper rebuttal evidence because it did not counter any new evidence put forth by W.R. Grace. In any event, Cheshire introduced extensive evidence of the fireproofing's friability during its case-in-chief and during cross-examination of W.R. Grace's experts, rendering the videotape excludable on rebuttal as, at best, cumulative evidence of friability.[13]

---

[13] *See also Fusco v. General Motors Corp.*, 11 F.3d 259 (1st Cir.1993) (exclusion of videotape demonstration where reenactment lacked sufficient similarity to accident at issue). Here it is also questionable whether a videotape of someone scrubbing fireproofing material with a toothbrush (presumably, with varying degrees of pressure and vigor) is particularly probative of the friable nature of the fireproofing relative to its release of asbestos fibers in the building during normal use and occupancy. While there was testimony about the possible bumping or banging of the fireproofing by maintenance personnel when working above the suspended ceiling, there was no evidence that anyone would likely be scrubbing it with any instrument like a toothbrush. The issue of significance regarding friability was whether the material was like "cement" ("locking in" respirable fibers) or whether it was "crumbly" (unstable and likely to release respirable fibers). The evidence admitted was fully adequate to allow the jury to determine the question and any more, even if probative, would have been cumulative.

IV. Conclusion

For the foregoing reasons, Cheshire's motion for a new trial (document no. 208) is denied.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1687

CHESHIRE MEDICAL CENTER,
Plaintiff, Appellant,

v.

W. R. GRACE & CO.,
Defendant, Appellee.

Before

Torruella, *Chief Judge*,
Selya, Cyr, Boudin, Stahl and Lynch,* *Circuit Judges*
and Keeton,**, *District Judge*.

ORDER OF COURT

Entered: May 17, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

---

*Judge Lynch did not participate in the consideration or decision of this petition.

**Of the District of Massachusetts, sitting by designation.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By /s/ JANICE M. O'NEIL
Chief Deputy Clerk.

[cc: Messrs: Speights and Wiebusch]

NO. 94-1687

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHESHIRE MEDICAL CENTER

Plaintiff-Appellant

v.

W.R. GRACE & CO. AND W.R. GRACE & CO.-CONN,

Defendant-Respondents

On Appeal From a Judgment of the United States
District Court for the District of New Hampshire

APPELLANT'S PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING IN BANC

Michael P. Hall
NIXON, HALL AND HESS
Eighty Merrimack Street
Manchester, NH 03101
(603) 669-8080

Daniel A. Speights
SPEIGHTS & RUNYAN
304 Lee Avenue
Post Office Box 685
Hampton, SC 29924
(803) 943-4444

ATTORNEYS FOR THE APPELLANT
CHESHIRE MEDICAL CENTER

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions:

1) *Memphis Community School District v. Stachura,* 477 U.S. 299 (1986);

2) *Newport v. Facts Concerts, Inc.,* 453 U.S. 247 (1981);

3) *Palmer v. Hoffman,* 318 U.S. 109 (1943);

4) *Duford v. Sears, Roebuck and Co.,* 833 F.2d 407 (1st Cir. 1987);

5) *Broderick v. Harvey,* 252 F.2d 274 (1st Cir. 1958).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1) May this court refuse to decide whether or not an admittedly flawed charge warrants a new trial by *sua sponte* overruling the District Court's explicit holding that "counsel properly preserved the issue by timely objection"?

2) Does Fed.R.Civ.P. 51 require a party who distinctly states why it believes the failure to charge is error to further give a particular formulation of the omitted charge and additionally explain why the claimed error would warrant a new trial?

3) May this Court avoid plain error review when the District Court admits the instructional error and decides the merits?

INTRODUCTION

The District Court admitted that its failure to charge on strict liability for inadequate warnings "was indeed error," that Cheshire "properly preserved the issue by timely objection" and is "entitled to a new trial, on the strict liability count, if the error affected its substantial rights," but found that the error was harmless because the "jury's verdict on the negligence count necessarily precluded a finding in plaintiff's favor with respect to the strict liability duty to warn." *Cheshire Medical Center v. W.R. Grace & Co.*, 853 F.Supp. 564, 568-69 (D.N.H. 1994).[1]

Cheshire's primary challenge to this harmless error holding (no negligence means no strict liability) "never asked this Court to address the 'interesting' issue of whether or not strict liability and negligence differ on the duty to warn." Appellant Reply at 7. Cheshire instead argued that the jury as charged had to find for Grace if it found a duty to warn and reasonable care to warn, while the omitted charge allowed the jury to find for Cheshire if it found a duty to warn which Grace breached "although it exercised all possible care." Appellant Reply at 7.[2]

---

[1] Exhibit A is the panel opinion; Exhibit B is the District Court's published decision; and the Addendum and Appendix Cheshire filed on appeal are cited, respectively, as "Add." and "App."

[2] Cheshire relied on *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1230-31 (1st Cir. 1990) (Selya, J.), *aff'd on remand* 981 F.2d 7 (1st Cir. 1992) which noted that the duty to warn in negligence and in Massachusetts warranty law (akin to strict liability) are similar, but held that inadequately provided warnings can be a breach of warranty even absent negligence. *Touch v. Master Unit Die Products, Inc.*, 43 F.3d 754, 757 (1st Cir. 1995) (Cyr, J.) recently

Cheshire secondly argued that the omitted strict liability charge was not harmless because the jury could have considered inadequate warnings in determining whether Grace's product was defectively designed.

Despite the District Court's explicit holding that the issue was "properly preserved by timely objection," the panel dismissed Cheshire's primary challenge with a four paragraph *sua sponte* holding that Cheshire's objection was not specific enough to preserve the issue. Ex. A at 22-23. In contrast, the panel spent over eleven pages on the second challenge, silently overruling *Duford v. Sears, Roebuck and Co.*, 833 F.2d 407, 411-412 (1st Cir. 1987) (Campbell, C.J.) and creating its own parade of disasters to refute bizarre arguments Cheshire never made. Ex. A at 10-21.[3]

In banc review is necessary because Cheshire's objection was much more specific than the mere exchange of case citations that *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 n. 6 (1986) held was specific enough to satisfy Fed.R.Civ.P. 51, and because the panel ignored the plain terms of Rule 51 and altered the *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943) requirement that an objection simply bring "into focus the precise nature of the alleged error" by also requiring that an objection give

---

struck a similar distinction between negligence and strict liability under the RESTATEMENT (Second) OF TORTS.

[3] Cheshire, for example, never said anything about a manufacturing defect. Ex. A at 10-14. Cheshire relied on *Duford* to say that inadequate warnings may be considered in determining whether a product is defectively designed. Opening Brief at 21, 28; Appellant Reply Brief at 9.

a particular formulation of an omitted charge and further explain why the claimed error warrants a new trial.

In banc review is also necessary because the panel's eleven page discussion of the "cumulative effect of the evidence" and the "all factors" determination (Ex. A at 10-21) directly conflicts with the view of New Hampshire product liability law expressed in *Duford v. Sears, Roebuck and Co.*, 833 F.2d 407, 411-412 (1st Cir. 1987) (Campbell, C.J.).

In banc review is lastly necessary because the panel did not even perform the same plain error analysis on the admitted instructional error that the panel performed on another challenged instruction. Ex. A at 9. *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981) held that even an untimely objection still deserved review on the merits once the District Court has addressed the merits. Manifest injustice is thus the only term that aptly describes the panel's refusal to even decide whether or not the admittedly flawed charge warrants a new trial.

I. THE INSTRUCTIONS AND VERDICT FORM SHOW THAT THE DISTRICT COURT CLEARLY UNDERSTOOD CHESHIRE'S OBJECTION.

The panel *sua sponte* concluded that Cheshire's objection was not specific enough by construing it as a needless request to charge that Grace can be strictly liable if it is negligent:

> Plaintiff's request for instruction and objection to the charge, generously construed in plaintiff's favor were sufficient, we assume, to alert the

> trial judge to plaintiff's contention that a departure from ordinary prudence with respect to warning and instructions for use would render the product defective for the purpose of plaintiff's strict liability claim. In its denial of the motion for a new trial, the trial court conceded that it [sic] instruction had been error in this regard. Ex. A at 22.

To the contrary, the instructions and special verdict form the parties and the Court agreed to before the charge (Appellee Brief at 3 n. 2) clearly show that Cheshire objected because Grace can be strictly liable even if it is not negligent, not because it is negligent.

The District Court charged that negligence and strict liability were separate liability claims (Add. 31), that Cheshire was entitled to full compensation if the jury found for Cheshire on "any one" of its liability claims (App. 1834), but that Cheshire was not entitled to multiple recovery if the jury found for Cheshire on more than one claim. App. 1838. The verdict form that the parties and Court agreed to before the charge thus required that the jury fully compensate Cheshire if Grace was negligent, but did not allow further compensation if Grace was both negligent and strictly liable. Ex. A at 3-4 (citing special verdict form).

These instructions and verdict form show that when Cheshire objected it did not care whether the jury was instructed that "a departure from ordinary prudence with respect to warnings" would also render Grace strictly liable. Ex. A at 22. By that time everyone knew that Cheshire would get the same amount of damages if the

jury found any "departure from ordinary prudence" (negligence) whether Grace was strictly liable or not.

The liability instructions given and Grace's own proposed charges also show that everyone understood that Cheshire objected because Grace can be strictly liable without being negligent.

The District Court charged that Grace could be liable for inadequate warnings, but only if it failed to use reasonable care. After the charge that "[n]egligence is the failure to use reasonable care" (Add. 32), the Court instructed that

> If the defendant knew or should have known that the fireproofing it sold to the plaintiff was dangerous or that it would damage property, the defendant had a duty in the exercise of reasonable care to inform purchasers of the fireproofing of that danger. . . . Add. 32-33 (cited in 853 F.Supp. at 567).

In sharp contrast, the strict liability instruction correctly charged that a product in a "defective condition unreasonably dangerous" can render Grace strictly liable "although it has exercised all possible care in the preparation and sale of its product." Add. 34-35. The Court, however, failed to charge that inadequate warnings can be considered in determining whether the product is in such a condition. 853 F.Supp. at 567-568 (citing "unreasonably dangerous" charge).

After the jury was fully charged but before its deliberations, the Court stopped Cheshire's attempt to incorporate its earlier proposed charges and told Cheshire that "if it had an objection to the charge, I think you better

make it right here." App. 977. Cheshire did exactly what the Court directed and, as its first objection, Cheshire immediately raised the failure to charge that inadequate warnings can render Grace strictly liable:

> MR. SPEIGHTS: Your, Honor, we do not believe the Court charged that a – failure to warn can also make a product unreasonably dangerous, that it can be a defective and dangerous product under strict liability as well as a count in the negligence cause of action. A product may be unreasonably dangerous if it does not have an adequate warning. App. 977-78.

The only reason (indeed the only conceivable reason) Cheshire requested a warning charge "under strict liability as well as a count in negligence" (App. 977-978) was that the jury had already been charged that negligence requires the "failure to use reasonable care" (Add. 32) but that Grace could be strictly liable "although it has exercised all possible care." Add. 35. Grace certainly understood this same distinction well enough to propose a specific charge on its strict liability for inadequate warnings (App. 1946)[4] in addition to its proposed charges on negligent warnings. App. 1938-41; 1943-47.

---

[4] Grace's request to charge strict liability for warnings read:

> In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning as to the possible dangers but only if it knew or should have known of these dangers at the time of the sale. . . . As with the plaintiff's negligence claim, W.R. Grace & Co. cannot be liable to Cheshire Medical Center if, at the time of the sale, it neither knew or should have known about possible dangers in its product. App. 1946.

At that point, the District Court could have easily cured Cheshire's objection. First, the Court could have given Cheshire's request to charge that "A product may be unreasonably dangerous if it does not have an adequate warning" and then repeated its earlier duty to warn charge without the reference to reasonable care. 853 F.Supp. at 567. The Court itself noted that two duty to warn charges would have "closely resembled" each other "had the court properly charged the jury following Cheshire's objection." 853 F.Supp. at 569 n. 3. Second, the Court could have given the request to charge that "A product may be unreasonably dangerous if it does not have an adequate warning" and then given the "may be dangerous" duty to warn charge Cheshire later requested (Ex. A at 6). Third, the Court could have even given the strict liability duty to warn charge Grace proposed. App. 1946 (cited in Petition at note 4). Once included in the strict liability instructions, any one of these alternative duty to warn charges would have cured Cheshire's objection by telling the jury that a duty to warn can be breached "although [Grace] exercised all possible care." Add. 35.

The District Court did not attempt to explore any cure because it overruled Cheshire's objection, holding that "the charge in general is a fair charge, is accurate, consistent with the law and covers many of the points you've raised at side bar." App. 985. The Court later admitted its error. 853 F.Supp. at 568.

II. THE DISTRICT COURT CONFIRMED THAT CHESHIRE SATISFIED FED.R.CIV.P. 51 WHEN IT EXPLICITLY HELD THAT CHESHIRE'S ERROR WAS PRESERVED.

The new trial pleadings and order verify the basis of Cheshire's objection and that it was properly preserved.

Cheshire's initial new trial memoranda confirmed the basis of its objection as clearly as humanly possible. It argued that, "Properly instructed, the jury could have found that Monokote's lack of an adequate warning rendered Grace strictly liable regardless of whether or not it used reasonable care." Citing *Allen v. Chance Mfg. Co.*, 873 F.2d 465 (1st Cir. 1989) (Campbell, C.J.),[5] Cheshire again stressed: "As instructed, the jury had to find that Grace was negligent to hold it liable for failing to adequately warn. Properly instructed, it did not." Docket 208 at 6-8. Cheshire's supporting reply again relied on *Allen*, addressed *Kotler*, and yet again stressed that strict liability exists "regardless of whether reasonable care has been exercised." Docket 214 at 7-8.

Given two chances to do so, Grace's responses to these pleadings never even hinted that the objection was not preserved. Grace argued the merits, saying that the failure to charge was not error and that *Kotler* showed that any error was harmless because the proposed strict liability charge was "materially equivalent" to the negligence charge. Docket 210 at 11-15; Docket 215 at 5.

---

[5] After noting that Massachusetts warranty law is akin to strict liability, *Allen* held that inadequate warnings can be a breach of warranty absent negligence. *Allen*, 873 F.2d at 466 n. 2.

The District Court, who had more than a cold record to review and who was certainly familiar with Rule 51 – it cut Cheshire short when Cheshire tried to incorporate its earlier proposed charges ("I can't let you do that, Mr. Speights;" App. 977) – never suggested that it misunderstood Cheshire's objection, that it lacked an opportunity to correct the charge before jury deliberations, or that Fed.R.Civ.P. 51 was violated in any way.

Quite the contrary, the District Court devoted over two pages of its published decision explaining why its failure to charge "was indeed error," how the error was "properly preserved by timely objection," and why Cheshire was entitled to a new trial on its strict liability claim if the error was prejudicial. 853 F.Supp. at 566-68. The Court concluded:

> Because the instruction given did not specifically inform the jury that the manufacturer's failure to warn could be relevant to the existence of an unreasonably dangerous design defect, *Chellman* [*Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993)] compels the conclusion that the court's omission of a strict liability failure-to-warn instruction was indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability claim, if the error affected its substantial rights. 853 F.Supp. at 568.

The only reason the Court denied a new trial on the strict liability claim was that the Court accepted Grace's view of *Kotler* and spent over a page of its published decision explaining that it believed its admitted error was harmless because "the jury's verdict on the negligence

count necessarily precluded a finding in plaintiff's favor with respect to the strict liability duty to warn." 853 F.Supp. 568-69.[6]

This Court has repeatedly held that Rule 51 binds the District Court as firmly as the parties and that its purpose "is to give the trial judge an opportunity to correct any error before the jury retires to deliberate." *See, e.g., Transnational Corp. v. Rodio & Ursillo, Ltd.*, 920 F.2d 1066, 1069 (1st Cir. 1990). To *sua sponte* overrule the District Court's explicit holding that Cheshire "properly preserved the issue by timely objection" is to say that the District Court itself violated Rule 51, did not know what really happened at trial, and was incapable of giving a strict liability for inadequate warning charge upon request. The District Court deserves more respect.

In banc review is necessary because this record shows that the District Court clearly understood Cheshire's objection when it held that the issue was "properly preserved." 853 F.Supp. at 568. The record in *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 n. 6 (1986) was much less specific.

---

[6] This harmless error holding (no negligence means no strict liability) is the issue Cheshire appealed. It has absolutely nothing to do with whether there is strict liability if there is negligence, the objection the panel *sua sponte* said Cheshire made and the error the panel *sua sponte* said the District Court conceded. Ex. A at 22.

III. FED.R.CIV.P. 51 DOES NOT REQUIRE A PARTICULAR FORMULATION OF A REQUESTED CHARGE OR AN EXPLANATION OF WHY THE CLAIMED ERROR WARRANTS A NEW TRIAL.

Although the District Court did not allow Cheshire to incorporate its proposed charges into its objections (App. 977), it footnoted its observation that Cheshire did not include in its proposed charges a particular formulation of its requested strict liability charge. 853 F.Supp. at 569 n. 3.[7] While the District Court never suggested that this meant Cheshire's objection was not specific enough, and despite its explicit holding that the issue was "properly preserved by timely objection" (853 F.Supp. at 568), the panel latched onto this idea to *sua sponte* hold that Cheshire's objection was procedurally barred because it "proffered no form of instruction on duty to warn as part of the strict liability claim." Ex. A at 22.

Besides the common sense dictate that a party will not propose a solution for an error after the District Court disagrees that there is an error, Rule 51 does not require such a proffer. The rule's provision that a party "may" file such prior requests to charge shows that it is unnecessary, *Lear v. Equitable Life Assurance Society of the United States*, 798 F.2d 1128, 1133 (8th Cir.), *cert. denied* 479 U.S.

---

[7] Grace noted this remark in a single phrase of its Appellee brief (at 2), but even on appeal never said that the error was improperly preserved. Grace instead repeated its no error arguments and, to further argue harmless error, relied exclusively on three sentences from a hornbook co-authored by the panel's author. Appellee Brief at 36. Cheshire's Reply noted that this view cannot be reconciled with New Hampshire and First Circuit law. Reply Brief at 8.

1066 (1987), and this Court has rejected a Rule 51 attack where no such proffer was made. *Broderick v. Harvey*, 252 F.2d 274, 276 (1st Cir. 1958).

The panel also seemed to hold that Cheshire's objection had to explain that Cheshire wanted a strict liability instruction precisely because the jury could find Grace strictly liable even if it was not negligent. Ex. A at 22. While this is the harmless error issue Cheshire raised on appeal, Rule 51 does not require an explanation of why an error would warrant a new trial any more than it requires a particular formulation of the proposed charge.

By its plain terms, all Rule 51 requires is that a party "state distinctly the matter objected to and the grounds of the objection," or, in the Supreme Court's words, that the party bring "into focus the precise nature of the alleged error." *Palmer v. Hoffman*, 318 U.S. at 119. In banc review is necessary to reconcile the panel's opinion with First Circuit and Supreme Court precedent.

IV. THE DISTRICT COURT HAD BEFORE IT AT LEAST THREE SPECIFIC FORMULATIONS OF GRACE'S DUTY TO WARN.

Even if such a proffer was necessary, the District Court had before it at least three specific proposals on Grace's duty to warn, including a strict liability charge Grace itself proposed. As noted above, the District Court could have simply deleted the six-word reference to reasonable care from the duty to warn charge it gave (853 F.Supp. at 567), given the duty to warn charge Cheshire later urged (App. 978), or even given the duty to warn charge Grace proposed. App. 1946. The point is that the

primary prejudice Cheshire suffered from the admittedly flawed charge has nothing to do with any particular duty to warn formulation. The primary prejudice has always been that the jury could have found Grace strictly liable for inadequate warnings "although it exercised all possible care." Appellant Reply at 8-9.

V. THE PANEL'S DECISION ON THE "CUMULATIVE EFFECT" AND "ALL-FACTORS" APPROACH IS IN DIRECT CONFLICT WITH CIRCUIT PRECEDENT.

Cheshire also argued that the admittedly flawed charge was prejudicial because a properly instructed jury could have found Grace strictly liable once it was told to consider the warnings' inadequacy along with the available, safer product designs. Opening Brief at 27-29; Reply Brief at 8-9.

This drew a lengthy discussion on why Cheshire implicitly requested "a surrender of judicial responsibility for instructing the jury to respect the law's outside limits on jury discretion." Ex. A at 15. Cheshire specifically dissociates itself from any such attempt, and is compelled to note that its view of New Hampshire law stands in good company.

In a decision on New Hampshire strict product liability law authored by Chief Judge Campbell and joined in by Judges Bownes and Torruella, this Court specifically held that the jury could consider the adequacy of the warnings "in conjunction with" available alternative designs:

> The jury might have based liability solely on the inadequacy of the warning, viewing the embossing as too small, the directions for proper installation unclear, or the instruction warnings as too general. **Alternatively, or perhaps in conjunction with a belief that the warnings were only marginally sufficient, the jury might have found that an available and reasonable alternative design . . . would have substantially reduced the product's dangerousness.**

Duford v. Sears, Roebuck and Co., 833 F.2d 407, 411-12 (1st Cir. 1987) (emphasis added). *Duford* also stands in good company – *Reid v. Spandone Machine Co.*, 119 N.H. 457, 463, 404 A.2d 1094, 1098 (1979) earlier held that a jury could find strictly liability once it coupled a design defect (placement of buttons on a machine) with the inadequate warnings.

Although Cheshire repeatedly cited *Duford* on appeal (Opening Brief at 21, 28; Reply Brief at 9), the panel's condemnation of a "cumulative effect" or "all factors" approach fails to even acknowledge this Court's directly conflicting decision. In banc review is necessary to reconcile the two.

VI. IN BANC REVIEW IS NECESSARY TO PERFORM A PLAIN ERROR ANALYSIS ON THE ADMITTED INSTRUCTIONAL ERROR.

Citing *Poulan v. Greer*, 18 F.3d 979, 982 (1st Cir. 1994), the panel performed a plain error analysis when it held that another instructional objection was insufficient (Ex. A at 9-10). The opinion, however, is significantly silent on

whether or not the instructional error the District Court admittedly made (853 F.Supp. at 568) is plain error.

Cheshire recognizes that plain error reversals are limited to those errors which have "seriously affected the fairness, integrity, or public reputation of judicial proceedings," *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), but submits that this case is an even stronger case for plain error review than was *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 255-257 (1981). In *Newport*, the District Court addressed the claim of instructional error on its merits after it observed that the objection was untimely. *Id.* at 255. In this case, the District Court addressed the claim of error on its merits after it explicitly held that its failure to charge "was indeed error," that Cheshire "properly preserved the issue by timely objection," and that Cheshire is "entitled to a new trial, on the strict liability count, if the error affected its substantial rights." 853 F.Supp. at 568.

In these rare circumstances – where the District Court has explicitly held that the error it admittedly made was "properly preserved by timely objection" – *sua sponte* reliance on Rule 51 to avoid even deciding whether the admitted error was harmless does indeed affect this proceeding's fairness and integrity. It is truly manifest injustice to overrule the District Court's unappealed holding that Cheshire's objection was indeed preserved.

Even if Cheshire's objection was indeed bad, in banc review is still necessary to reconcile the panel's failure to perform a plain error review with *Newport* and *Poulan*.

At the very least panel rehearing is warranted so that the same plain error analysis the panel earlier performed

on Cheshire's other claim can be performed on the admitted error. Ex. A at 9-10.

CONCLUSION AND ALTERNATIVE REQUESTS FOR RELIEF

In banc rehearing or panel rehearing should be granted, the panel opinion vacated, and Cheshire granted a new trial on its entire strict liability claim so that the jury can consider whether or not inadequate warnings "in conjunction with" available alternative designs render Grace strictly liable. *Duford*, 833 F.2d at 411-12. Even the District Court recognized that this would be the proper remedy. 853 F.Supp. at 566 n. 1. Cheshire alternatively narrows its new trial request to a trial on its strict liability for inadequate warnings claim so that a jury can determine whether or not inadequate warnings render Grace strictly liable whether or not it departed from ordinary prudence.

Respectfully submitted,

Michael P. Hall
NIXON, HALL AND HESS
Eighty Merrimack Street
Manchester, NH 03101
(603) 669-8080

Daniel A. Speights
SPEIGHTS & RUNYAN
304 Lee Avenue
Post Office Box 685
Hampton, SC 29924
(803) 943-4444

BY: /s/ Michael P. Hall
Michael P. Hall

ATTORNEYS FOR THE APPELLANT
CHESHIRE MEDICAL CENTER

CERTIFICATION

I hereby certify that two copie [sic] of the foregoing Petition for Rehearing was mailed this 20th day of March, 1995 to Richard V. Wiebusch, Esquire, opposing counsel.

/s/ Michael P. Hall
Michael P. Hall, Esquire

* * *

[p. 110] question, it's perfectly proper. Just do so in writing by handing the note to the foreperson, whoever you elect, who will hand it to the court security officer, who will bring it to me.

But in that question it's very important that you not say, for example, we are divided on the issue of X by three to two or five to four or whatever the split might be, okay? That's what that means, but don't let anybody know your numerical division at any time. So it's very important that you not ever during the course of your deliberations let me or anybody else know what numerical division might exist within the jury on a particular issue.

All right. Counsel?

AT THE BENCH

MR. SPEIGHTS: Your Honor, we would incorporate our proposed instructions which the Court did not give as a part of our objections. In addition, your Honor –

THE COURT: No, no. I can't let you do that, Mr. Speights. If you have an objection to the charge, I think you better make it right here.

MR. SPEIGHTS: Your Honor, we do not believe the Court charged that a – that failure to warn can also make a product unreasonably dangerous, [p. 111] that it can be a defective and dangerous product under strict liability as well as a count in the negligence cause of action. A product may be unreasonably dangerous if it does not have an adequate warning.

In addition to that, your Honor, on the duty to warn under negligence, under the proposed charge once removed, your Honor proposed a charge that a duty exists if the plaintiff – if the defendant knew or should have known that the product might be dangerous, and in the final charge your Honor made it a certainty that the defendant knew or should have known that it was dangerous, and we don't think that's the proper standard. We don't think the defendant has to know with certainty. If the defendant knows that it might be dangerous, we believe that is sufficient to give a rise to a duty to warn.

Your Honor, the statute of limitations defense, we'd requested previously that the third prong of the test not be simply that asbestos fibers posed a health risk, but something else. The language I would propose, although there are several variations, would go to the injury that the plaintiff knew or should have known that it had been

* * *

DEFENDANTS' INSTRUCTION NO. ___

A manufacturer has a duty to inspect and test its product. In addition, a manufacturer is bound to keep reasonably abreast of scientific knowledge and discovery in its field. However, just as it would be clearly unreasonable to hold Ford Motor Company to today's standard of scientific knowledge when determining liability for injury caused by a 1971 Mustang, so too it would be unreasonable to impose liability on W.R. Grace & Co. based on today's scientific knowledge and standards for sales of Monokote in 1971. W.R. Grace & Co. can only be held to the standard of expertise in the field at the time its product was manufactured and sold. In order to prevent a product from being unreasonably dangerous, the seller may be required to give a warning as to the possible dangers but only if it knew or should have known of these dangers at the time of sale. In this regard, you may consider that W.R. Grace & Co. put a warning in its product brochures informing architects and contractors about potential hazards. As with the plaintiff's negligence claim, W.R. Grace & Co. cannot be liable to Cheshire Medical Center if, at the time of the sale, it neither knew nor should have known about possible dangers in its product. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 530, 464 A.2d 288, 298-299 (1983); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 807-808, 395 A.2d 843, 847 (1978).

No. 95-263

(2)

Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

CHESHIRE MEDICAL CENTER,
PETITIONER,

v.

W.R. GRACE & CO. AND
W.R. GRACE & CO. – CONN.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

HAROLD HESTNES
60 State Street
Boston, MA 02109
(617) 526-6000
Counsel of Record
RICHARD V. WIEBUSCH
HARRY T. DANIELS
JANE CETLIN PICKRELL
HALE AND DORR
1155 Elm Street
Manchester, NH 03101
(603) 628-7400
HOWARD M. COOPER
TODD & WELD
One Beacon Street
Boston, MA 02108
(617) 720-2626
Counsel for Respondents

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

21 pp.

RULE 29.1 STATEMENT

W.R. Grace & Company is the parent corporation of W.R. Grace & Co. – Conn. Grace's subsidiaries or partnerships, other than wholly-owned operations, are: A-O Grace Kaustik, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Grace Cocoa Associates LP, Grace Offshore Turnkey, Grace Ventures Partnership I & II, Healthcare Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kisha, North Suburban Dialysis, OB One & IV too, Palm Springs I.V. Care II, Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, Grace Specialty Chemical Indonesia P.T., Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, and VNA-NMC Homecare Partnership.

TABLE OF CONTENTS

		Page
RULE 29.1 STATEMENT		i
TABLE OF AUTHORITIES		iv
COUNTERSTATEMENT OF THE CASE		1
	Prior Proceedings And Factual Background	1
1.	The District Court Did Instruct The Jury In Substance On The "Duty to Warn" In Strict Liability	2
2.	An Explicit Strict Liability "Duty to Warn" Instruction Was Unsupported By The Evidence	4
3.	The Jury Expressly Found That The Fireproofing Product At Issue Was Not Unreasonably Dangerous When Marketed In 1971 And Therefore Did Not Need to Be Removed From The Petitioner's Building	5
REASONS WHY THE WRIT SHOULD NOT BE GRANTED		6
	The Court Of Appeals Applied The Correct Legal Standard In Reviewing The Alleged Errors In The Jury Charge	6
A.	The Court Of Appeals Reviewed The Jury Instructions As A Whole	6
B.	De Novo Review Was Proper	6
C.	The Court Of Appeals In Fact Adopted The District Court's Findings	8
D.	The First Circuit Properly Applied The Plain Error Exception To Federal Rule Of Civil Procedure 51	10
CONCLUSION		16

TABLE OF AUTHORITIES

CASES

Page

American Hoist & Derrick Co. v. *Sowa & Sons*, 725 F.2d 1350 (Fed. Cir.), *cert. denied*, 469 U.S. 281 (1984) 12

Chellman v. *Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993) 4

City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 9, 10

City of St. Louis v. *Prapotnik*, 485 U.S. 112 (1988) .. 2

Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990) 6, 7

Hasbrouck v. *Texaco, Inc.*, 842 F.2d 1035 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990) 7

Hicks v. *United States*, 150 U.S. 442 (1893) 7

In Re Public Service Co. of New Hampshire, 879 F.2d 987 (1st Cir. 1989) 8

J.E. Riley Inv. Co. v. *Commissioner of Internal Revenue*, 311 U.S. 55 (1940) 8

Jafke v. *Dunham*, 352 U.S. 280 (1957) 9

Lee v. *Terminal Transport Co.*, 269 F.2d 97 (7th Cir. 1959) 3

Morris v. *Getscher*, 708 F.2d 1306 (8th Cir. 1983) ... 11

999 v. *C.I.T. Corp.*, 776 F.2d 866 (9th Cir. 1985)... 7

O'Brien v. *Willys Motors, Inc.*, 385 F.2d 163 (6th Cir. 1967) 11

Pate v. *Seaboard R.R., Inc.*, 819 F.2d 1074 (11th Cir. 1987) 12

Poulin v. *Greer*, 18 F.3d 979 (1st Cir. 1994) 10

Pritchard v. *Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965) 11

Rodrique v. *Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980) 11

Page

Salve Regina College v. *Russell*, 499 U.S. 225 (1991) . 6
Scivally v. *Time Ins. Co.*, 724 F.2d 101 (10th Cir. 1983) 9
Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80 (1943) 9
Shokuwan Shimabukuro v. *Higeyoshi Nagayama*, 140 F.2d 13 (D.C. Cir. 1944) 12
Sommerville v. *U.S.*, 376 U.S. 909 (1964) 7
Stewart v. *Hall*, 770 F.2d 1267 (4th Cir. 1985) 11
Thomas v. *Arn*, 474 U.S. 140 (1985) 12
U.S. v. *Chandler*, 996 F.2d 1073 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994) 6
U.S. v. *Olano*, 113 S.Ct. 1770 (1993) 12
United States v. *Atkinson*, 297 U.S. 157 (1936) 11
Waits v. *Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993) 7
Werbungs Und Commerz Union Austalt v. *Collectors' Guild Ltd.*, 930 F.2d 1021 (2d Cir. 1991) 11
Yoham v. *Rosecliff Realty Co.*, 267 F.2d 9 (3d Cir. 1959) 3

STATUTES

Fed. R. Civ. P. 51 . . . . . *passim*
Fed. R. Civ. P. 52 7
Fed. R. Crim. P. 52(b) 12
N.H. Rev. Stat. Ann. 141-E (1990) 13

MISCELLANEOUS

9A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure §2558 . . . . . 6, 11

In the
Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-263

CHESHIRE MEDICAL CENTER,
PETITIONER,

v.

W.R. GRACE & CO. AND
W.R. GRACE & CO. - CONN.,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Prior Proceedings and Factual Background

Following a four and one-half week trial, during which the petitioner was permitted to call twenty-one witnesses — either live or by deposition testimony — and to introduce numerous documents which it contended supported its claim, a jury concluded that the respondents' asbestos-containing fireproofing product, Monokote-3, was not unreasonably dangerous, posed no hazard to anyone and did not have to be removed from the petitioner's building. The jury was immediately polled, and each juror confirmed without hesitation that the verdict for the respondents was unanimous. The petitioner subsequently filed a motion for a new trial which was denied by the district court on the grounds that "the petitioner's substantial rights were not adversely affected" by certain alleged evidentiary and jury instruction errors made at trial, and that there was therefore

no basis for overturning the verdict.[1] Applying similar reasoning, the First Circuit Court of Appeals affirmed the judgment on the jury's verdict and the district court's denial of the motion for new trial. The court of appeals subsequently denied the petitioner's petition for rehearing and suggestions for rehearing in banc, thus concluding that there existed no basis for the claims of error that the petitioner now presses upon this Court.

The petition relies on two claims which have no basis in the First Circuit's opinion: (1) that the First Circuit failed to defer to the district court's determination that the petitioner's objection to the lack of an instruction on strict liability "duty to warn" was properly preserved when, in fact, the court of appeals reviewed the objection and expressly stated, as did the district court, that the failure to so instruct was error, but that it was harmless error, and (2) that the petitioner was somehow prejudiced by the First Circuit's application of the plain error exception to Fed. R. Civ. P. 51, when in fact, the plain error analysis by the court of appeals afforded the petitioner more review of its unpreserved claims of instructional error than it would have received in a circuit that does not apply the plain error exception.

The jury's verdict and the decisions of the district court and the court of appeals establish the following facts.

1. *The district court did instruct the jury in substance on the "duty to warn" in strict liability.*

The district court instructed the jury on the petitioner's strict liability claim using an instruction which was nearly identical to the one requested by the petitioner.[2] *See City of*

---

[1] While the petitioner's motion for new trial asserted errors in the evidence and charge to the jury, the petition for a writ of certiorari relies only upon the trial court's supposedly erroneous instructions and the appeals court's review of those instructions.

[2] *Compare* Jury Instructions at 19 (Appendix to Appellant's Brief to the First Circuit Court of Appeals ("Appendix to Brief") at 1767) *with* Plaintiff's Proposed Jury Instructions No. 33 (Appendix to Brief at 1883).

St. Louis v. *Prapotnik*, 485 U.S. 112 (1988) (there is no error in failing to give an instruction in the precise words of the petitioner's request if its substance is clearly stated). As the petitioner concedes, in both its proposed jury instructions and its response to the district court's draft charge, it simply never requested that the jury be separately instructed on "duty to warn" in the context of strict products liability.[3] And, as the First Circuit observed, the petitioner neglected to provide the district court with a proposed strict liability "duty to warn" instruction in its objections following the charge, and thus failed to comply with Fed. R. Civ. P. 51. (Appendix ("App.") at A22).

The district court specifically instructed the jury that, in determining whether the respondents were strictly liable under a products liability theory, it should consider all of the respondents' acts or omissions, including their alleged failure to "lessen or eliminate the danger of even a useful and desirable product." (App. at A31). This instruction invited the jury to consider whether the respondents had taken steps, including issuing a warning, to eliminate any dangers the product posed. Thus, the jury was fully instructed on New Hampshire strict products liability law, as requested by the petitioner, when it found from the evidence that the respondents' fireproofing was not a defective product. *(See App.* at A35-36 & n.5).

In ruling on the petitioner's motion for new trial, the district court found that even if it was error not to give a separate strict liability "duty to warn" instruction, the error was harm-

---

[3] In its petition, the petitioner argues that it was error for the trial court not to have given the *respondents'* proposed instruction on strict products liability. The respondents respectfully suggest that Rule 51 does not contemplate such an objection. *See Lee* v. *Terminal Transport Co.*, 269 F.2d 97, 99 (7th Cir. 1959) (defendant was not in a position to complain on appeal that certain matter was omitted from instructions where omitted material was not covered in any of the instructions that were tendered by the defendant and refused); *Yoham* v. *Rosecliff Realty Co.*, 267 F.2d 9 (3d Cir. 1959) (under Fed. R. Civ. P. 51, before a party can complain on appeal of the failure of the court to give a specific instruction, party must show it requested that instruction).

less because the jury was adequately instructed on the identical "duty to warn" in connection with the petitioner's negligence claim.[4] Since the court did instruct the jury on a "duty to warn" in the context of the negligence claim and the jury, nevertheless, decided against the petitioner, no different result would have been expected if the court had repeated that "duty to warn" instruction as part of the strict liability charge. Regardless of the legal theory, the jury found that there was simply nothing to warn about.

2. *An explicit strict liability "duty to warn" instruction was unsupported by the evidence.*

The petitioner took great pains to argue at trial that its architect and contractors — the entities which specified, ordered, received and used the Monokote-3 — were *not* its agents for any purpose.[5] Furthermore, the petitioner presented no evidence that it, or anyone on its behalf, ever had an opportunity to observe the fireproofing packaging or

---

[4] In so holding, the district court construed *Chellman* v. *Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993) to impose an identical "duty to warn" standard on both negligence and strict liability claims. Accordingly, the district court concluded that, had it also instructed the jury on a strict liability "duty to warn," "[i]n the absence of a proposed instruction from plaintiff," its additional instruction "would have likely closely resembled the negligence 'duty to warn' instruction" which the court had already given. (App. at A35 n. 3).

The First Circuit, however, found that *Chellman* did not answer the question whether an identical "duty to warn" standard applied to both negligence and strict liability claims. The court observed that *Chellman* was inapposite because, unlike the present case, in which the jury considered *and* rejected the petitioner's negligence and strict liability claims, *Chellman* involved only a strict liability claim and the jury had not been instructed on "duty to warn," with the result that the plaintiff in *Chellman* was deprived of the opportunity to have the jury consider his strict liability claim based on "duty to warn." (App. at A5-6).

[5] *See* Memorandum of Law in Support of Plaintiff's Position that Knowledge of the Architect Is Not Imputable to Cheshire in This Case. (Appendix to Brief at 2017).

any "warning" that would have appeared thereon.[6] Therefore, the jury had no evidentiary basis on which to conclude that a "warning" on the product could have made any difference to the petitioner. Moreover, the petitioner's own evidence showed that its architects had specifically selected Monokote-3 at a time when an alternative, asbestos-free product was available from the respondents.[7] Placing a statement on the fireproofing bags, indicating that the product contained asbestos, would have amounted to nothing more than a post-sale confirmation that the petitioner was getting precisely what it had ordered.

3. *The jury expressly found that the fireproofing product at issue was not unreasonably dangerous when marketed in 1971 and therefore did not need to be removed from the petitioner's building.*

The petitioner's own evidence demonstrated that any levels of airborne asbestos in its building were well below those permitted by both federal and state law.[8] This evidence proved that the fireproofing did not pose a danger to either building occupants or maintenance personnel. Even if the petitioner could have established that the respondents had a "duty to warn" of a hazard in the fireproofing, that such a warning would have been seen by the petitioner or anyone on its behalf, and that a strict liability "duty to warn" is different from a negligence "duty to warn" under New Hampshire law, the petitioner still could not have prevailed on its strict liability claim because it failed to establish that there was any hazard to users of its building or that it had sustained any injury.

---

[6] Because the record is devoid of this evidence, the respondents can only refer the Court to the record generally to confirm this lack of evidence from the petitioner. *See, e.g.*, Trial Transcript, October 12, 1993 at 196-203, Plaintiff's Exhibits 30, 32 and 89.

[7] Appendix to Brief at 688-90, Defendants' Exhibit 247.

[8] *See* Appendix to Brief 1013-1023; 254-255; 305-306; Trial Transcript October 15, 1993 p.m. at 64-65.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD IN REVIEWING THE ALLEGED ERRORS IN THE JURY CHARGE.

A. *The Court Of Appeals Reviewed The Jury Instructions As A Whole.*

Contrary to the petitioner's assertion, the standard of appellate review of alleged errors in jury instructions is well settled. The function of the court of appeals, in reviewing instructions under Fed. R. Civ. P. 51, is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law. *See* 9A Charles A.Wright and Arthur R. Miller, *Federal Practice and Procedure* §2558, at 456-57 and nn. 1 & 3 (2d ed. 1995) (and cases cited therein). In determining whether a charge was erroneous, the appellate court must consider the instructions as a whole. *Id.* This is precisely what the court of appeals did in this case.

B. *De Novo Review Was Proper.*

The petitioner argues, in part, that the district court erred in construing the requirements of New Hampshire law regarding what instructions to give the jury on the strict liability claim. This, however, is an issue of law and the law is well settled that the court of appeals was entitled to review such an error *de novo*. *See Salve Regina College* v. *Russell*, 499 U.S. 225, 231 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law.")[9] *See also U.S.* v. *Chandler*, 996 F.2d 1073, 1085

[9] The petitioner's reliance on *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990) for the proposition that a court of appeals must defer to the trial court is misplaced. That case held that in a Rule 11 proceeding, the court of appeals should defer to the district court's conclusions because such conclusions are rooted in factual determinations rather than purely legal in-

(11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994) (challenge to jury instruction presents question of law reviewed *de novo); Waits* v. *Frito-Lay, Inc.*, 978 F.2d, 1093, 1100 (9th Cir. 1992) (whether a jury instruction misstates the elements that must be proved at trial is question of law to be reviewed *de novo), cert. denied*, 113 S. Ct. 1047 (1993)); *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1035, 1044 (9th Cir. 1987) (failure to submit proper jury instruction in civil action is question of law reviewed *de novo), aff'd*, 496 U.S. 543 (1990); 999 v. *C.I.T. Corp.*, 776 F.2d 866, 871 (9th Cir. 1985) (same).

Moreover, the logic of the petitioner's argument, that the court of appeals was required to defer to the district court's determination on whether the petitioner properly preserved its objection, would seem to invite the untenable corollary that an appeals court must likewise defer to a trial court's determination that a petitioner did not properly preserve its objection. This would leave no role for a court of appeals under Rule 51.[10]

---

quiries, and the district court, "familiar with the issues and the litigants, is 'better situated to marshal the pertinent facts' and apply the necessary fact-dependent legal standard." *Cooter & Gell*, 496 U.S. at 402. In so holding, the Court looked to Fed. R. Civ. P. 52, which requires deference to the factual findings, but not to the conclusions of law, drawn by a trial court.

In contrast, the appellate court is certainly able to review whether a party properly preserved its objections merely by looking at the record. Rule 51, being somewhat mechanical in its specified procedure for preserving objections to jury instructions, would seem to contemplate a review by the appellate court as to whether proper procedure was followed by the trial court.

Additionally, contrary to the petitioner's characterization, *Hicks* v. *United States*, 150 U.S. 442 (1893) held that an appellate court could review the trial judge's charge *as a whole* for error and could *reverse* the trial judge's rulings on the exception made to those instructions even where those exceptions arguably were inadequate.

[10] It is not apparent how the petitioner benefits from this argument. Deference to the district court's treatment of the asserted instructional errors (*i.e.*, the district court rejected the petitioner's claim of error and denied its motion for a new trial) would necessarily result in the affirmation of the jury's verdict in respondents' favor. For this reason alone, grant of the writ is unwarranted. *See, e.g., Sommerville* v. *U.S.*, 376 U.S. 909 (1964)

In any event, the record in this case demonstrates that the court of appeals considered all of the errors in the charge that were alleged by the petitioner, including the omission of a strict liability "duty to warn" instruction.

C. *The Court Of Appeals In Fact Adopted The District Court's Findings.*

The court of appeals did not disregard the trial court's finding that the petitioner had properly preserved its objection that no separate instruction was given on a "duty to warn" with respect to the strict liability claim. In fact, the court of appeals assumed, as did the district court, that the omission of such an instruction was erroneous, but held, for different reasons than the district court, that it was a harmless error.[11] *See generally, In Re Public Service Co. of New Hampshire*, 879 F.2d 987, 989 (1st Cir. 1989) ("It is well settled that a judgment, which is correct in ultimate effect, will not be disturbed on appeal even though the lower court relied upon a wrong ground or gave an untenable reason for its action. *The issue on appeal is the correctness in ultimate effect of a judgment and not the reason or reasons given for it by the trial court.* If the judgment is sustainable upon any legal basis, it will be upheld on appeal despite the erroneous or untenable reasons given by that court for its entry.") (Emphasis in original). *See also J.E. Riley Inv. Co.* v. *Commissioner of*

(certiorari denied despite conflict between state and federal law where resolution of conflict would not change result reached below because petitioner would be liable under either law).

[11] The First Circuit opinion expressly states: "The court's charge to the jury on strict liability failed to include any reference to warning or instructions for use. *We assume, as did the trial court in considering plaintiff's motion for new trial, that this was error. . . . The trial court concluded, however, that the error was harmless. So do we, though on somewhat different reasoning*, from that of the trial court because, unlike the trial court, we do not undertake to predict exactly how the Supreme Court of New Hampshire will resolve a novel issue of substantive law on which plaintiff-appellant relies." (App. at A5) (Emphasis supplied).

Internal Revenue, 311 U.S. 55, 59 (1940) ("[W]here the decision below is correct, it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action."); *Jafke* v. *Dunham*, 352 U.S. 280, 281 (1957) (a successful party in the district court may sustain its judgment on any ground that finds support in the record); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (acknowledging "the settled rule that, in reviewing the decision of the lower court, it must be affirmed if the result is correct although the lower court relied on a wrong ground or gave a wrong reason"); *Scivally* v. *Time Ins. Co.*, 724 F.2d 101, 103 (10th Cir. 1983) (trial court decision will be affirmed, even when its basis is erroneous, when record reveals another ground which supports the decision). The court of appeals reasoned here that the jury's rejection of the petitioner's "duty to warn" negligence claim barred the strict liability "duty to warn" claim because the jury must have concluded either that the petitioner had failed to prove that the respondents' warnings and instructions violated the prudent care standard, or that the petitioner failed to prove that any inadequacy in the warning caused the petitioner an injury. (App. at A14-15).

Having assumed, as did the district court, that it was error for the district court not to give a strict liability "duty to warn" instruction, and having concluded, as did the district court, albeit on different reasoning, that the error was harmless, the court of appeals went on to note, as an *additional* ground for affirming the district court, that the petitioner was procedurally barred from claiming error because the petitioner failed to proffer such an instruction at trial, as required by Fed. Civ. P. 51. (App. at A22). This observation by the court of appeals was plainly correct. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256, 276-277 (1981) (in the absence of a properly specific objection under Rule 51 made before the jury retires, a party ordinarily cannot claim on appeal that the trial court erred in giving an instruction).

D. *The First Circuit Properly Applied The Plain Error Exception To Federal Rule Of Civil Procedure 51.*

Although the federal rules of civil procedure clearly contemplate that failure to object to (a) an instruction which has been given or (b) the failure to give a jury instruction which has been requested, precludes appellate review, plain error review under Rule 51 is available to correct obvious instances of injustice or misapplied law. *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 256.[12] Resort to plain error analysis, however, is appropriate only when an objection is *not* properly preserved. *See Poulin* v. *Greer*, 18 F.3d 979, 982 (1st Cir. 1994).

As the First Circuit made clear in *Poulin*, which it cited in this case with approval, but which the petitioner conveniently ignores, the plain error rule is an exception to Rule 51's requirements and is to be "applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice." *Poulin*, 18 F.3d at 982. Under the plain error exception, an erroneous instruction (or the failure to give an instruction) warrants a new trial only where the error "seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Id.* (citation omitted).

Contrary to the petitioner's assertion, the apparent conflict in the circuit courts over the availability of plain error review is irrelevant and would not affect the outcome in this case. Indeed, with the exception of the Ninth and Seventh Circuits, all of the federal appeals courts utilize a nearly identical

[12] The petitioner argues that *Newport* created confusion regarding the scope of Rule 51, and the availability of a plain error exception to the application of that Rule, and that consequently, resolution of instructional errors varies from circuit to circuit. The petitioner ignores the fact that because it litigated in a forum which allows plain error review of *unpreserved* objections (the same circuit which *Newport* held properly applied the exception) the petitioner was able to obtain judicial review of its claimed error, even though it did not object at trial. Thus, the petitioner was effectively afforded more, not less, review than it might have received in a circuit which does not apply the plain error exception.

standard for finding plain error. *See* 9A Wright and Miller, *supra*, §2558. *See, e.g., Werbungs Und Commerz Union Austalt* v. *Collectors' Guild Ltd.*, 930 F.2d 1021, 1026 (2d Cir. 1991) ("An appellate court will reverse a jury charge on grounds of plain error only when reversal is 'necessary to correct a fundamental error or to prevent a miscarriage of justice.'"); *Pritchard* v. *Liggett & Myers Tobacco Co.*, 350 F.2d 479, 486 (3d Cir. 1965) ("Where it is apparent on the face of the record that a miscarriage of justice may have resulted from counsel's failure to properly protect the interest of his client by timely objection, an error must be noticed and rectified. . . . Since the errors in the trial of this case were fundamental and highly prejudicial, this exception to the general rule is applicable."), *cert. denied*, 382 U.S. 987 (1966); *Stewart* v. *Hall*, 770 F.2d 1267, 1271 (4th Cir. 1985) (in very limited circumstances, a court may consider issue raised for first time on appeal "if the error is 'plain' and if our refusal to consider such would result in the denial of fundamental justice."); *Rodrigue* v. *Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980) (noting that the plain error doctrine "is not a routine by-pass to Rule 51 . . . The criterion for application of this doctrine is 'certainly not whether [this] court approves or does not disapprove the results of the case.' Plain error is found, however, if 'the deficient charge is likely responsible for an incorrect verdict which in itself creates a substantial injustice.'") (citation omitted), *cert. denied*, 449 U.S. 1113 (1981); *O'Brien* v. *Willys Motors, Inc.*, 385 F.2d 163, 166 (6th Cir. 1967) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.") (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)); *Morris* v. *Getscher*, 708 F.2d 1306, 1309 (8th Cir. 1983) ("Under federal law, '[e]rror in the instructions not properly objected to is waived unless the error is plain error in the sense that a miscarriage

of justice would otherwise occur.' [P]lain error will be found in only those exceptional cases where the error has 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'") (citations omitted); *Pate* v. *Seaboard R.R., Inc.*, 819 F.2d 1074, 1083 (11th Cir. 1987) ("In order to merit reversal as plain error, appellants must establish that the challenged instruction was an incorrect statement of the law and that it was probably responsible for an incorrect verdict, leading to a substantial injustice."); *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama*, 140 F.2d 13, 15 (D.C. Cir. 1944) ("The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case. But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review."); *American Hoist & Derrick Co.* v. *Sowa & Sons*, 725 F.2d 1350, 1364 (Fed. Cir.) (court will reverse jury verdict on the ground of plain error in a charge that was not objected to where it is necessary "to correct a fundamental error"), *cert. denied*, 469 U.S. 821 (1984).

Moreover, review under Fed. R. Crim. P. 52(b), which codifies the plain error principle and provides the underpinnings for the civil exception, is, by its terms, discretionary. *See U.S.* v. *Olano*, 113 S.Ct. 1770, 1778 (1993) ("Rule 52(b) is permissive, not mandatory. If the forfeited error is 'plain' and 'affect[s] substantial rights,' the Court of Appeals has authority to order correction but is not required to do so. . . . [T]he discretion conferred by Rule 52(b) should be employed 'in those circumstances in which a miscarriage of justice would otherwise result.'") The rule thus implicitly recognizes that courts of appeal are generally and necessarily allowed a wide measure of discretion in the supervision of litigation in their respective circuits. *See generally Thomas* v. *Arn*, 474 U.S. 140, 146-48 (1985) (under its supervisory powers that permit, at the least, the promulgation of procedural rules governing

the management of litigation, the court of appeals properly refused to consider error at trial to which petitioner had failed to object).

Thus, the petitioner should not be heard to argue that the court of appeals was wrong in applying plain error review to a claim of error based on the omission of an instruction relative to New Hampshire's statutory standard for nonoccupational exposure to asbestos. Because the petitioner did not object at trial, and thus failed to comply with Rule 51, absent resort to the plain error exception, there was no basis for review of this purported error by the court of appeals. (App. at A9).[13] Moreover, in that review, the court of appeals found the New Hampshire statute to bear only upon the calculation of costs that the petitioner might incur in the future. Thus, it construed the statute to be relevant only on the issue of damages, a question which the jury never reached, and consequently held that if a failure to instruct the jury on the statutory provisions was error, it was harmless.[14]

---

[13] The court of appeals clearly reviewed the claim of error based on the failure to instruct on the New Hampshire statutory nonoccupational exposure standard. The court of appeals stated: "The [petitioner], although objecting to the court's failure to instruct the jury on the New Hampshire statute, did not object to that part of the court's instructions telling the jury that these statutes were relevant to the issue of damages only and not to the issue of liability. The [petitioner] having failed in its objections and request for instruction to articulate an argument for relevancy to liability, or any legal basis for relevancy, we review the trial court's instructions only for plain error." (App. at A9).

[14] The New Hampshire statute at issue, N.H. Rev. Stat. Ann. §141-E (1990), authorizes the State Department of Health and Human Services to enforce the asbestos exposure standards set forth in the statute and to promulgate regulations pertaining to asbestos abatement activities. The provisions on which the petitioner sought an instruction merely define the jurisdictional threshold of authorization for the director of the division of public health services to take certain regulatory action, and set the permissible exposure levels in both occupational and nonoccupational environments. However, at trial, the petitioner produced no evidence that the jurisdictional threshold had ever been applied to its building or that it had been required to close its building as a result of indoor air asbestos fiber levels. Thus, the argument that under New Hampshire law the petitioner would have had to close down its facility is not based on any evidence introduced

Further, the court of appeals properly concluded that the petitioner's attempt to find error in the district court's failure to instruct separately on the "duty to warn" in the strict liability context could not succeed where the petitioner *did not* articulate in any meaningful way (either at trial or on appeal) what substantive instruction it contended the trial court should have given. (App. at A21). Moreover, after its thorough analysis of the "all factors" test advanced by the petitioner on appeal, the court of appeals was compelled to conclude in substance, that the petitioner *could not* have articulated a logical instruction for the trial court to give which did not abrogate the rules governing the burden of proof, *stare decisis* and the role of the jury. (App. at A10-21). By considering and rejecting the possible instructions which the district court might have given — over and above an "ordinary prudence" instruction — the court of appeals effectively gave the petitioner plain error review of an objection the petitioner had not properly preserved.

Even if the First Circuit had not applied plain error review to the petitioner's claim that the district ocurt should have instructed the jury on a more burdensome "duty to warn" standard in the context of strict liability, there would be no merit to the petitioner's contention that the court of appeals selectively applied the plain error exception only to the omission of an instruction on the New Hampshire statutory nonoccupational exposure standard. When it reviewed and rejected the claim of error based on the trial court's failure to give a strict liability "duty to warn" instruction, the court of appeals

---

at trial. Moreover, throughout the trial, the petitioner disavowed any claims of harm to building occupants; its theory was that only the occupational exposure standard — which is the same under state and federal laws — had any relevance to the case. The jury was instructed on the identical federal occupational exposure standard and found that no violation of that standard occurred and, consequently, that no injury was sustained by the petitioner. Thus, an instruction that the New Hampshire statute established liability would clearly have been unsupported by law or the evidence and therefore erroneous.

was not, as it was with the New Hampshire statutory nonoccupational exposure standard, dealing with an unpreserved objection to the trial court's instructions. The court of appeals plainly accepted, rather than "silently overruling" as the petitioner contends, the trial court's determination that the petitioner had "properly preserved by timely objection" its objection to the trial court's failure to give a strict liability "duty to warn" instruction, but rejected the petitioner's argument anyway. There was simply no occasion for the court of appeals to review for plain error an objection which it *had already* concluded was properly preserved. Thus, the petitioner has no basis for arguing that the court of appeals somehow acted inconsistently when it applied the plain error exception to review the petitioner's *unpreserved* claim that the trial court erred in not instructing the jury on the New Hampshire statutory nonoccupational exposure standard and did not apply the plain error exception to review the petitioner's *preserved* claim that the trial court erred in not giving a strict liability "duty to warn" instruction.

CONCLUSION

Because the First Circuit afforded the petitioner all of the review it was entitled to, the petition neither raises any material conflict among the circuits nor makes a meritorious claim of any other misapplication of any federal rule. The issues presented by the petitioner therefore do not warrant review by this Court and the petition should be denied.

Respectfully submitted,

HAROLD HESTNES
60 State Street
Boston, MA 02109
(617) 526-6000
Counsel of Record
RICHARD V. WIEBUSCH
HARRY T. DANIELS
JANE CETLIN PICKRELL
HALE AND DORR
1155 Elm Street
Manchester, NH 03101
(603) 628-7400
HOWARD M. COOPER
TODD & WELD
One Boston Place
Boston, MA 02108
(617) 720-2626
Counsel for Respondents

Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

No. 95-263

In The

Supreme Court of the United States

October Term, 1995

CHESHIRE MEDICAL CENTER,

Petitioner,

v.

W.R. GRACE & CO. AND W.R. GRACE & CO.-CONN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL P. HALL
NIXON, HALL AND HESS
Eighty Merrimack Street
Manchester, NH 03101
(603) 669-8080

DANIEL A. SPEIGHTS
SPEIGHTS & RUNYAN
304 Lee Avenue
Post Office Box 685
Hampton, SC 29924
(803) 943-4444

Attorneys for the Petitioner Cheshire Medical Center

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The "Facts" Grace Says Are Established Are Arguments The District Court And First Circuit Rejected 1

II. Grace Mischaracterizes The First Circuit's Decision 2

III. Grace Mischaracterizes The Questions Presented 4

IV. Grace's Challenges to Question 1 Are Unpersuasive 4

V. Grace's Challenges to Question 2 Are Unpersuasive 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES:

Allen v. Chance Mfg's Co., 873 F.2d 465 (1st Cir. 1989) 3

Chellman v. Saab-Scania AB, 138 N.H. 73, 637 A.2d 148 (1993) 1

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 5

Hicks v. United States, 150 U.S. 442 (1893) 4, 6

Kotler v. American Tobacco Co., 926 F.2d 1217 (1st Cir. 1990), *aff'd on remand*, 981 F.2d 7 (1st Cir. 1992) 2, 3

United States v. Olano, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 5, 7

INTRODUCTION

Respondents' ("Grace") counter-statement of the case raises under the guise of established "fact" the same arguments the District Court rejected when it admitted legal error (A31-32 (853 F.Supp. at 568))[1] and the same arguments the First Circuit rejected when it assumed that this admission of error was correct. A5 (49 F.3d at 29). Grace's opposition further mischaracterizes the First Circuit's decision and the questions presented, and offers no persuasive reason why the Petition should not be granted.

I. THE "FACTS" GRACE SAYS ARE ESTABLISHED ARE ARGUMENTS THE DISTRICT COURT AND FIRST CIRCUIT REJECTED.

Grace raised the same "facts" it tells this Court are established – that the omitted strict liability charge was not error and was unsupported by the evidence (Grace Opp. 2-5) – in opposition to Cheshire's motion for a new trial. Reply App. 1-7 (Excerpts from Grace Memorandum, Docket 210). The District Court disagreed:

> . . . *Chellman* [*Chellman v. Saab-Scania AB*, 138 N.H. 73, 637 A.2d 148 (1993)] compels the conclusion that the court's omission of a strict liability failure-to-warn instruction in this case was

---

[1] The appendix to the Petition is cited as "A ___," the appendix to this Reply as "Reply App. ___," the Petition as "Petition ___," and Grace's Brief in Opposition as "Grace Opp. ___."

> indeed error. Plaintiff's counsel properly preserved the issue by timely objection. Accordingly, Cheshire is entitled to a new trial, on the strict liability claim, if the error affected its substantial rights.
>
> A31-32 (853 F.Supp. at 568).

Grace again raised these same "facts" on appeal. Reply App. 8-15 (Excerpts from Grace Appellee Brief). The First Circuit assumed that the District Court correctly admitted its legal error. A5 (49 F.3d at 29).

II. GRACE MISCHARACTERIZES THE FIRST CIRCUIT'S DECISION.

Grace also mistakenly says that the First Circuit held that the admitted error was preserved and harmless (Grace Opp. 8-9, 15), and effectively performed a plain error review on this issue. Grace Opp. at 14. The face of the decisions show otherwise.

After noting that Massachusetts warranty law is "coextensive" with strict liability law (A32-33 n. 2 (853 F.Supp. 568-69)), the District Court relied heavily on *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990) (Mass. law), *aff'd on remand*, 981 F.2d 7 (1st Cir. 1992), to conclude that the legal error it admittedly made was harmless because the "no negligence" finding precluded a strict liability finding based on inadequate warnings. A32-36 (853 F.Supp. at 568-569). Cheshire pointed out on appeal (A55 n. 2) that *Kotler* actually shows that the admitted error was reversible error because the jury could have found that inadequate warnings rendered Grace strictly liable despite Grace's lack of negligence:

> Lest we oversimplify, we add that, although the formulation of the duty to warn is similar in both negligence and warranty, the inquiry into the breach of the duty can be quite dissimilar. For example, where an attempt has been made to warn of a particular hazard, the jury could conceivably conclude "that, although the manufacturer was not unreasonable and hence not negligent in the warning provided, the warnings were still insufficient to render the product suitable for its foreseeable uses." *Allen*, 873 F.2d at 466 n. 2. [*Allen v. Chance Mfg's Co.*, 873 F.2d 465 (1st Cir. 1989) (Mass. law)]. . . .
>
> When the adequacy of provided warnings are at issue, there is room to find breach of warranty even in the absence of negligence.
>
> *Kotler*, 926 F.2d at 1230-31 and n. 14.

In this case, the First Circuit began its opinion by noting that it was "precluded" from reaching this issue (A2 (49 F.3d at 28)), and later held that Cheshire's objection was not specific enough to preserve the issue, numbering this holding as its conclusion number "2." A22-23 (49 F.3d at 35-36).

Unlike its review of the omitted asbestos exposure level charge (A9-10 (49 F.3d at 30-31)), the First Circuit did not purport to review this issue for plain error, and totally disregarded the District Court's conclusion that Cheshire "properly preserved" its strict liability request to charge and is "entitled to a new trial, on the strict liability claim, if the error affected its substantial rights." A31-32 (853 F.Supp. at 568).

III. GRACE MISCHARACTERIZES THE QUESTIONS PRESENTED.

Grace argues that the law is well settled on the standards governing substantive review of an instruction's content (Grace Opp. 6-8), on an appellate court's ability to affirm on any ground in the record (Grace Opp. 8-9), and on the standards governing whether an instruction is plain error. Grace Opp. 10-12. The Petition does not implicate these issues.

Question 1 asks this Court to decide if a district court's explicit decision that an instructional objection "properly preserved" the error is entitled to deference in determining whether or not the objection is specific enough to require substantive review in the first place. Petition i. This asks if an appellate court can ignore the record, not if the court can base its decision on other grounds found in the record.

If this Court determines that appellate courts do indeed owe the same deference to a district court's specificity finding that this Court showed in *Hicks v. United States*, 150 U.S. 442, 453 (1893), the First Circuit on remand will, of course, apply the standards Grace cites for reviewing instructions on their merits – *de novo* review of state law to determine if the instructions as a whole tended to confuse or mislead the jury. Grace Opp. 6-7.

Assuming *arguendo*, however, that no deference is due (it is) and the admitted instructional error was not preserved (it was), Question 2 asks this Court to decide what, if any, limits exist on the discretion to review unpreserved instructional error in civil appeals (and if

this discretion even exists). Petition i. This asks if and when appellate courts should review for plain error, not what standards to apply once the court decides to do so.

If this Court resolves the circuit split by holding that plain error review is available and that the discretion to refuse this review is governed by *United States v. Olano*, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the First Circuit on remand will apply the plain error standards Grace emphasizes. Grace Opp. 10-12.

IV. GRACE'S CHALLENGES TO QUESTION 1 ARE UNPERSUASIVE.

Grace mistakenly says Cheshire's logic leaves "no role for a court of appeals under Rule 51." Grace Opp. 7. To the contrary, Question 1 only involves deference to a decision on an instructional objection's specificity, not its proper timing, and, like the deference granted in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), this specificity decision will still be subject to review for legal error. *Id.* at 402.

The cold record Grace further emphasizes (Grace Opp. 7 n. 9) ignores that the undisputed purpose of the specificity requirement is to give district courts an opportunity to correct legal error before jury deliberations. Petition at 8-9. Like the fact-dependent standard at issue in *Cooter*, it is the district court who is in the best, if not only, position to tell if the objection was indeed specific enough to give it this opportunity. *Cooter*, 496 U.S. at 402.

Hicks dispels Grace's further confusion about deference to decisions on an objection's specificity with decisions on an objection's merits. Grace Opp. 7 n. 10. As Grace notes (Grace Opp. 7 n. 9), this Court reversed on the merits after the Court deferred to the trial court's decision that the exception to the instructions was specifically enough to preserve the issues. *Hicks*, 150 U.S. at 453. Cheshire anticipates that the First Circuit will also reverse on the merits once it, like this Court in *Hicks*, defers to the District Court's conclusion that the instructional error it admittedly made was "properly preserved." A32 (853 F.Supp. at 568).

V. GRACE'S CHALLENGES TO QUESTION 2 ARE UNPERSUASIVE.

Grace misses the point when it suggests that Cheshire should be grateful that it litigated in a forum that afforded any plain error review (Grace Opp. 10 n. 12) and when Grace argues that Courts of Appeals are necessarily allowed a wide measure of discretion in the supervision of litigation (Grace Opp. at 12-13). Question 2 asks this Court to decide if there are any limits to the discretion a federal Court of Appeals says it has to review instructions for plain error in civil appeals[2] and if the limits

---

[2] Contrary to Grace's further misapprehension (Grace Opp. 13-14 and nn. 13-14), Cheshire does not challenge the First Circuit's plain error determination. Cheshire's point is that the First Circuit arbitrarily reviewed one instruction for plain error without reviewing for plain error the error the District Court admittedly made and held was properly preserved. Petition 11, 14.

Olano placed on this discretion in criminal cases apply to civil appeals. Petition 14-17.

Even Grace notes that *Olano* held that plain error review "should be employed 'in those circumstances in which a miscarriage of justice would otherwise result.' " Grace Opp. 12, *citing Olano,* 113 S.Ct. at 1778-79, 123 L.Ed.2d at 520-21. In this case, the instructional error the First Circuit inexplicably declined to review for plain error – the error the District Court admittedly made and held was "properly preserved" A31-32 (853 F.Supp. at 568) – resulted in at least as much a "miscarriage of justice" as the other instruction the First Circuit did review for plain error. A9-10 (49 F.3d at 30-31). It is, for example, undisputed that other Courts of Appeals that have applied this "miscarriage of justice" standard in diversity-based product liability actions have reversed defense verdicts based on instructional errors similar to the one the District Court admittedly made here. Petition 15-16.

To reach this question, however, this Court must first resolve the circuit split on whether the appellate courts have any discretion to review for plain error in civil appeals before it can decide if any limits exist on that discretion.

Should this Court decide that the majority of the Courts of Appeals correctly hold that plain error review does apply, and further decide that this review cannot be arbitrarily denied or is governed by *Olano,* Cheshire anticipates that the First Circuit will find that the admitted instructional error is plain error.

CONCLUSION

The Petition should be granted and the case remanded with directions that the First Circuit review its lack of specificity holding with deference to the District Court's conclusion that the issue was "properly preserved," or to at least perform the same plain error review of the admittedly erroneous instruction that the First Circuit performed on another instruction.

Respectfully submitted,

MICHAEL P. HALL
NIXON, HALL AND HESS
Eighty Merrimack Street
Manchester, NH 03101
(603) 669-8080

DANIEL A. SPEIGHTS
SPEIGHTS & RUNYAN
304 Lee Avenue
Post Office Box 685
Hampton, SC 29924
(803) 943-4444

Counsel for the Petitioner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Cheshire Medical Center, Plaintiff. v. W.R. Grace & Co. and W.R. Grace & Co.-Conn., Defendants.	Civil Action No. C-88-516-M

W.R. GRACE'S OPPOSITION TO PLAINTIFF'S MOTION FOR A NEW TRIAL

The defendants, W.R. Grace & Co. and W.R. Grace & Co.-Conn. (collectively, "W.R. Grace"), respectfully submit this memorandum in support of their objection to the plaintiff, the Cheshire Medical Center's ("CMC"), Motion For A New Trial.

Plaintiff's motion follows a defense verdict rendered after a long, carefully and fairly tried case, during which plaintiff was permitted to call each and every witness – either live or by deposition testimony – and to introduce numerous documents (often without prior notice to and over the objection of W.R. Grace) which it contended supported its claims. Indeed, a fair reading of the record shows that the plaintiff was given multiple opportunities to make every factual point it wished the jury to consider, including points which were only marginally relevant. Further, the plaintiff was repeatedly allowed to renew objections

* * *

[p. 11] neither expressly nor by implication impose liability and the plaintiff has cited no authority for the proposition that they do. An instruction that they did establish liability would clearly have been unsupported by law and therefore erroneous.[5]

B. The Court's Charge On The Issue Of Strict Product Liability And "Duty To Warn" Was Proper.

Plaintiff contends that the Court's refusal to instruct the jury on "duty to warn" as it applied to plaintiff's strict liability claim against W.R. Grace is reversible error. Plaintiff's argument fails because the instruction given by the Court accurately stated the applicable law and, in any event, either directly or in substance gave the instruction sought by the plaintiff.

---

[5] Again, this "liability versus damages" issue was argued at length prior to closing arguments. Any claim that the plaintiff was prejudiced by the Court's failure to give an instruction that the New Hampshire regulations establish liability is without foundation; the plaintiff had clear advance notice that such an instruction would *not* be given. Further, the Court did *not* indicate, as the plaintiff contends (Plaintiff's Memorandum at 2), when it took judicial notice of the statute that the jury would be instructed that the New Hampshire regulations imposed liability. *See* Tr. Oct. 19, 1993 a.m. at 60-61. *See, e.g., Simmons, Inc. v. Pinkerton's, Inc.*, 762 F.2d 591 (7th Cir. 1985) (trial court's failure to give instruction on specific provision of state statute was harmless error where court gave a number of other correct instructions on same issue).

1. The Jury Considered The "Duty To Warn" Issue And Rejected It.

As the plaintiff notes, the Court did instruct the jury as to each of the elements of a "duty of warn," albeit in the context of [p. 12] instructions on the negligence claim.[6] The jury's verdict for W.R. Grace on the negligence count necessarily included a finding that either W.R. Grace did not have a duty to warn or W.R. Grace had met any duty that existed. Had the jury been given a similar "duty to warn" instruction in the context of the strict liability claim, it would undoubtedly have made the same finding, and that finding would have been consistent with the jury's general verdict for W.R. Grace on the strict liability count. Accordingly, any purported failure to instruct on a "duty to warn" with regard to the strict liability claim was, at most, harmless error. *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1229 (1st Cir. 1990), *cert. granted and judgment vacated*, 112 S.Ct. 3019 (1992), *aff'd on*

---

[6] The instruction given by the Court was as follows:

In determining whether or not the defendant was negligent you must consider whether the defendant breached any duties owed to the plaintiff.

1. **Duty to Warn**

If the defendant knew or should have known that the fireproofing it sold to the plaintiff was dangerous to people or that it would damage property, the defendant had a duty in the exercise of reasonable care to inform purchasers of the fireproofing of that danger. The defendant had a continuing duty to warn the plaintiff of dangers associated with the fireproofing even after the sale of the fireproofing to the plaintiff if the defendant discovered after the sale that the product was defective or dangerous.

July Instructions at 16.

remand, 981 F.2d 7 ("[I]f the instructions that the jury should have received on breach of warranty were materially equivalent to, [p. 13] or subsumed by, the instructions actually received on negligence, then the failure to submit the warranty count to the jury was rendered harmless by the verdict on the negligence count").

In any event, the Court *did* instruct the jury generally and in substance on the "duty to warn" even in the context of the plaintiff's strict liability claim. The Court specifically instructed the jury that in determining whether W.R. Grace was strictly liable under a products liability theory, it should consider all of the acts or omissions of W.R. Grace, including any alleged failures to "lessen or eliminate the danger of even a useful and desirable product."[7] Such an instruction invited the jury to consider whether W.R. Grace had taken steps, including issuing a warning regarding its product, to eliminate any dangers the product posed.

---

[7] The Court instructed the jury as follows:

> In deciding whether the fireproofing product presents an unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if you decide that the fireproofing is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; *liability may exist if the manufacturer, W.R. Grace, did not take available and reasonable steps to lesson or eliminate the danger of even a useful and desirable product.*

July Instructions at 19-20 (emphasis added).

[p. 14] 2. The Necessity Of An Explicit "Duty To Warn" Instruction In The Context Of The Plaintiff's Strict Liability Claim Was Unsupported By The Evidence.

The testimony and documentary evidence demonstrated that W.R. Grace, in its 1971 Sweets Catalog brochure and through the efforts of Mr. Egan, issued an advisory to the public regarding the asbestos content of its product and invited purchasers to contact W.R. Grace to obtain further information. *See, e.g.*, Defendants' Ex. 268; Testimony of Thomas Feit, Tr. Oct. 20, 1993 p.m. at 59-66; Testimony of Thomas Egan, Tr. Oct. 27, 1993 a.m. at 104-107, Tr. Oct. 28, 1993 a.m. at 84-85. This evidence supported the conclusion that W.R. Grace did, in fact, warn purchasers of any potential dangers in its product. As such, the product could not have been defective *per se*. Because the plaintiff was unable to rebut this evidence that W.R. Grace had issued a warning, or that the warning as issued was adequate, there was no evidence that W.R. Grace failed to meet any duty to warn.

Further, the plaintiff presented *no* evidence that it, or anyone on its behalf, relied upon information printed on the bags of Monokote at the time of purchase or installation.[8] The jury had no evidentiary basis to find that a

---

[8] The plaintiff also took pains to argue that its architect and contractors – the entities which ordered, received and used the product – were *not* its agents for any purpose. Since the plaintiff consistently argued that it could not be bound by *notice* to its architect and contractors, it cannot take advantage of a *lack* of notice to them.

notice on the Monokote bag would have made any difference to anyone. Thus, the instruction [p. 15] now sought by the plaintiff was correctly denied. *Cabassa v. American Union Transport, Inc.*, 58 F.R.D. at 205 ("refusal to give proffered instructions not supported by the evidence is not error").

C. The "Duty To Warn" Instruction Followed Applicable Law.

The plaintiff next contends that the "duty to warn" instruction given by the Court was deficient in that it failed to instruct the jury that W.R. Grace was charged with a duty to warn potential purchasers if it knew or should have known that the asbestos-containing fireproofing *"might"* be dangerous. Plaintiff's Memorandum at 8.[9] Plaintiff thus argues that the Court should have instructed the jury to engage in pure speculation. The plaintiff goes on to assert that the Court should have removed the issue of W.R. Grace's duty to warn from the jury entirely and decided it in plaintiff's favor as a matter of law. Plaintiff's Memorandum at 8 ("The jury should have been instructed that reasonable care demanded that Grace warn about the product's possible dangers.")

---

[9] It should be noted that the Court did not indicate to counsel that it would give an instruction that included the conditional language now sought by the plaintiff. Indeed, no "duty to warn" instruction was included at all in the Court's draft jury instructions (attached to the Plaintiff's Memorandum at Tab A). Plaintiff has not pointed to any other instance in which such an inclination was expressed by the Court.

Plaintiff's arguments are unsupported by New Hampshire law and the evidence presented in this case. In *Thibault v. Sears,*

* * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1687

THE CHESHIRE MEDICAL CENTER,

Plaintiff-Appellant,

v.

W. R. GRACE & CO. and W. R. GRACE & CO.-CONN,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

BRIEF FOR DEFENDANTS-APPELLEES

Richard V. Wiebusch, Esq.
Harry T. Daniels, Esq.
Jane Cetlin Tickrell, Esq.
Hale and Dorr
1155 Elm Street
Manchester, NH 03101
(603) 628-7400

Howard M. Cooper, Esq.
Todd & Weld
One Boston Place
Boston, MA 02108
(617) 720-2626

Attorneys for Defendants-Appellees

[p. i] **TABLE OF CONTENTS**

	Page
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
REQUEST FOR ORAL ARGUMENT	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	8
SUMMARY OF ARGUMENT	23
ARGUMENT	25
I. The Charge To the Jury Fully and Correctly Set Forth the Applicable Law and Provides No Basis For A Reversal	25
II. The Court Properly Instructed The Jury On Strict Products Liability And Its Omission Of A Separate "Duty to Warn" Charge Was At Best Harmless Error	29
A. An Explicit "Duty to Warn" Instruction In the Context of Cheshire's Strict Liability Claim Was Unsupported by the Evidence	29
B. The Court Correctly Charged the Jury On Strict Liability "Duty To Warn"	32
C. Even If the Jury Should Have Been Separately Instructed On a Strict Liability "Duty to Warn," the Court's Failure To Do So Was Harmless Error	35
D. The Trial Court's Determination of Harmless Error Is Entitled to Due Deference By This Court	38
III. The Court Properly Instructed The Jury On The "Duty To Warn" In Negligence	39

IV. The Trial Court's Charge On The New Hampshire Statutory Asbestos Exposure Standard Was Correct 41

A. The New Hampshire Indoor Non-Occupational Standard Is Irrelevant To This Case ... 41

* * *

[p. 29] exposure levels ignores the fact that Cheshire disavowed any concern for non-occupational exposure at trial, the court instructed the jury on both federal and state laws relating to *occupational* exposure levels, and the court ruled, without objection from Cheshire, that federal and state laws establishing air quality standards could only be used to compute damages if liability were found and not to establish liability in the first instance. *See* App. 977-998 (counsel's objections to the charge). Because the jury resolved the issue of liability in Grace's favor on all three counts, it did not reach the issue of damages and Cheshire was not prejudiced by any omission of a specific instruction on the New Hampshire non-occupational exposure standard.

II. The Court Properly Instructed The Jury On Strict Products Liability And Its Omission Of A Separate "Duty to Warn" Charge Was At Best Harmless Error

A. An Explicit "Duty to Warn" Instruction In the Context of Cheshire's Strict Liability Claim Was Unsupported by the Evidence

Cheshire contends that the trial court's omission of a separate "duty to warn" instruction in the context of its strict liability claim against Grace is reversible error. This argument fails because the instruction given by the court

accurately stated the applicable law and was fully consistent with the evidence presented by Cheshire on this issue.

After a full month of trial during which Cheshire was given multiple opportunities to make every factual point it wished the [p. 30] jury to consider, and after several hours of deliberation, the jury concluded that MK-3 was not unreasonably dangerous when marketed in 1971 and does not need to be removed from Cheshire's building today. This determination is fully supported by the evidence presented by both Cheshire and Grace.

Cheshire's own evidence – including numerous tests of the concentration of asbestos fibers in the hospital air and personal monitoring of maintenance workers while engaged in activities involving exposure to the fireproofing – indicated that any airborne asbestos exposures were well below the action levels established by federal and state law (App. 1013-1023; App. 254-255, 305-306; Tr. Oct. 15, 1993 p.m. at 64-65). This evidence alone conclusively proved that the fireproofing did not pose an unreasonable danger to either building occupants or maintenance personnel and that Cheshire had indeed suffered no injury. *See generally Bellotte v. Zayre*, 531 F.2d 1100, 1103 (1st Cir. 1976) (evidence that burning characteristics of pajama top complied with federal Flammable Fabrics Act sustained finding that pajamas were not unreasonably dangerous as a matter of New Hampshire law). There was, in short, nothing for Grace to warn about.

Furthermore, Cheshire presented *no* evidence that it, or anyone on its behalf, ever saw or relied on any printed information relating to MK-3. In fact, Cheshire took great

pains to argue that its architect and contractors – the entities which specified, ordered, received and used the product – were *not* its [p. 31] agents for any purpose.[15] Thus, the jury had no evidentiary basis to find that any notice, on the Monokote bag or elsewhere, would have made any difference to anyone, and the instruction sought by Cheshire that Grace had a "duty to warn" in order to make the product less dangerous, was correctly denied. *Cabassa v. American Union Transport, Inc.*, 58 F.R.D. 200, 205 (D.P.R. 1972) ("refusal to give proffered instructions not supported by the evidence is not error").

Finally, Grace did timely disclose to the public the very thing Cheshire complains it should have "warned" about, *i.e.*, the presence of asbestos in its MK-3 product. The testimony and documentary evidence demonstrated that Grace, in its 1971 Sweets Catalog Brochure and through the efforts of Mr. Egan, issued repeated statements to the public regarding the asbestos content of its product and invited purchasers to contact Grace to obtain further information. *See, e.g.*, Ap. 1310-1316; App. 457-464, 660-663, 739-740; Def. Exs. 548, 549; Tr. Oct. 26, 1993 a.m. at 128-130. This evidence supported the conclusion that Grace did, in fact, inform purchasers about the content of its product. As such, the product could not have been defective *per se* due to an alleged lack of a warning disclosing the product's contents. [p. 32] Because

---

[15] Since Cheshire consistently argued that it could not be bound by *notice* to its architect and contractors, it should not now be permitted to take advantage of a *lack* of notice to them. *See* Memorandum of Law in Support of Plaintiff's Position that Knowledge of the Architect is not Imputable to Cheshire in This Case (App. 2017).

Cheshire was unable to rebut this evidence that Grace had issued such a disclosure, or that the disclosure as issued was adequate, there was no evidence that Grace failed to meet any "duty to warn."

B. The Court Correctly Charged the Jury On Strict Liability "Duty To Warn"

Even if Cheshire could have established that Grace had a "duty to warn" of a hazard in Monokote, that such a warning would have been seen by Cheshire or anyone on its behalf, and that the "duty to warn" in strict products liability is somehow different from that in negligence, Cheshire still would not have prevailed on its strict liability claim for the simple reason that it failed to establish that it had sustained any injury.

In a products liability claim based on defective design, the burden is on the plaintiff to prove that: (i) the design of the product created a defective condition that was unreasonably dangerous to the user, (ii) the condition existed at the time the product was sold, (iii) the use of the product was reasonably foreseeable by the manufacturer, and (iv) the condition of the product caused injury to either the user or the user's property. *See Chellman v. Saab-Scania AB*, 138 N.H. 73, 77, 637 A.2d 148, 150 (1993) (adopting Restatement (Second) of Torts § 402-A (1965)). The presence and efficacy of a warning is only *one* consideration pertaining to only *one* element of this cause of action. *See Chellman*, 138 N.H. at 77, 637 A.2d at 150 (" 'failure to warn' [p. 33] focuses on the first element of strict products liability: whether a design defect caused the product to be unreasonably dangerous. Whether a

product is unreasonably dangerous also requires the consideration of its social utility balanced against the risk of danger, the cost and practicality of reducing the risk of danger, and the presence or absence and efficacy of a warning of hidden danger.") This is, in substance, the charge that Cheshire sought and that the court gave.[16]

---

[16] The court instructed the jury as follows:

> In deciding whether the fireproofing product presents an unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if you decide that the fireproofing is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; liability may exist if the manufacturer, W.R. Grace, did not take available and reasonable steps to lesson or eliminate the danger of even a useful and desirable product.

July Instructions at 19 (App. 1767).

Cheshire proposed a nearly identical instruction:

> *DESIGN DEFECT AND SOCIAL UTILITY:* In determining whether the defendant's product was defectively designed and "not reasonably safe" for its intended use in buildings, you should consider whether safer substitute products were available or could have been developed, and you should then weigh the social utility or desirability of the product against the dangers inherent in its use. Utility or usefulness of a product must be evaluated from the point of view of the public as a whole. In weighing utility and desirability against danger, you should consider whether the risk of danger could have been reduced without significant impact on product effectiveness and manufacturing costs. Thus, even if the product is socially useful and desirable, a manufacturer such as the defendant will still be held liable if it

[p. 34] It is significant that in both its proposed jury instructions and its response to the court's draft instructions, Cheshire did not request that the court instruct the jury separately on "duty to warn" in strict products liability. *See* Plaintiff's Proposed Jury Instructions Nos. 29-34 (App. 1878-1884); Plaintiff's Response to Court's Draft Jury Instructions (App. 2011).

Nevertheless, the court *did* instruct the jury in substance on the "duty to warn." The court specifically instructed the jury that in determining whether Grace was strictly liable under a products liability theory, it should consider all of the acts or omissions of Grace, including its alleged failures to "lessen or eliminate the danger of even a useful and desirable product." Such an instruction invited the jury to consider whether Grace had taken steps, including issuing a warning regarding its product, to eliminate any dangers the product posed. Additionally, the court specifically instructed the jury on the identical duty to warn in connection with its negligence claim. *See* § III at pp. 39-41, *infra*. Thus, the jury was fully and correctly instructed on strict products liability law when it found from the evidence that MK-3 was not a defective product.

* * *

---

did not take steps which were available to lessen or eliminate a known or foreseeable danger.

Plaintiff's Proposed Jury Instructions No. 33 (App. 1883).